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No. 08-___

IN THE

Supreme Court of the United States

SCOTT A. MCLAUGHLIN
Petitioner,

v.

STATE OF MISSOURI
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

CAPITAL CASE
PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Missouri law requires the sentencing jury to determine that mitigating evidence weighs less than aggravating evidence *before* a person convicted of first-degree murder can be eligible for a possible death sentence. Nonetheless, in petitioner's case, the Missouri Supreme Court held that the defendant must bear the burden of persuasion at the weighing step. Missouri is the only state in the country that requires the defendant to demonstrate the sufficiency of the mitigating evidence to a unanimous jury. This gives rise to the following two questions:

I. Whether the rule announced in *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum . . . must be submitted to a jury and proved beyond a reasonable doubt," applies to the weighing of aggravating and mitigating evidence at the penalty phase of a capital trial.

II. Whether Missouri law violates the Eighth and Fourteenth Amendments by requiring the defendant to carry the burden of demonstrating to a unanimous jury that mitigating evidence outweighs aggravating evidence.

PARTIES TO THE PROCEEDING

The petitioner is Scott A. McLaughlin, the defendant and defendant-appellant in the courts below. The respondent is the State of Missouri, the plaintiff and plaintiff-respondent in the courts below.

TABLE OF CONTENTS

CAPITAL CASE
QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 15

I. THE STATE AND FEDERAL COURTS ARE IRRECONCILABLY CONFLICTED 17

A. Four State Courts of Last Resort Find *Apprendi* Applicable to the Weighing of Aggravating and Mitigating Evidence. 17

B. In Direct Contrast, the Majority of State and Federal Courts Find *Apprendi* Inapplicable to the Weighing of Aggravating and Mitigating Evidence. 20

C. The Opinion Below Cannot Be Reconciled with this Court's Sixth Amendment Jurisprudence or the Decision of any other Court that has Addressed this Issue. 23

II. Placing the Burden of Persuasion on the Prosecution at the Weighing Step Comports with this Court's Sixth Amendment Jurisprudence. 24

III. The Eighth and Fourteenth Amendments Limit Imposition of Capital Punishment to Instances Where the State Demonstrates that Mitigating Evidence is Insufficient to Warrant Life Imprisonment. 30

CONCLUSION 35

APPENDIX A

Opinion of the Supreme Court of Missouri, En Banc, dated Aug. 26, 2008 ..... 1a

APPENDIX B

Letter dated September 30, 2008 from Clerk of the Supreme Court State of Missouri to Ms. Deborah B. Wafer, Office of State Public Defender – "Appellant's motion for rehearing overruled." 43a

APPENDIX C

Verdict and Instructions 45a

TABLE OF AUTHORITIES

FEDERAL CASES:

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... *passim*

Baze v. Rees, 128 S. Ct. 1520 (2008) 33, 34

Blakely v. Washington, 542 U.S. 303 (2004) 25

California v. Brown, 479 U.S. 538 (1987) 29

Coker v. Georgia, 433 U.S. 584 (1977) 33

Gregg v. Georgia, 428 U. S. 153 (1976) 32

Harris v. Alabama, 513 U.S. 504 (1995) 6

Kansas v. Marsh, 548 U.S. 163 (2006) 16, 30, 31

Kennedy v. Louisiana, 554 U.S. __ ,
128 S.Ct. 2641 (2008) 32

Lockett v. Ohio, 438 U.S. 586 (1978) 32

McKoy v. North Carolina, 494 U.S. 433 (1990) 16

Mullaney v. Wilbur, 421 U.S. 684 (1975) 30, 33

Proffitt v. Florida, 428 U.S. 242 (1976) 6

Ring v. Arizona, 536 U.S. 584 (2002) ..... *passim*

Roper v. Simmons, 543 U.S. 551 (2005) 34

Sattazahm v. Pennsylvania, 537 U.S. 101 (2003) ... 26

Schriro v. Summerlin, 542 U.S. 348 (2004)
..... 28, 32-33

Trop v. Dulles, 356 U.S. 86 (1958) 33

United States v. Barrett, 496 F.3d 1079
(10th Cir. 2007) 23

United States v. Fields, 483 F.3d 313
(5th Cir. 2007) 23

United States v. Mitchell, 502 F.3d 931
(9th Cir. 2007) 22

United States v. Sampson, 486 F.3d 13 (1st Cir. 2007) 22

Walton v. Arizona, 497 U.S. 639 (1990) 24, 31

STATE CASES:

Brice v. State, 815 A.2d 314 (Del. 2003) 21

Commonwealth v. Roney, 866 A.2d 351 (Pa. 2005) 21

Duest v. State, 855 So. 2d 33 (Fla. 2003) 15

Evans v. State, 886 A.2d 562 (Md. 2005) 21, 28

Johnson v. State, 59 P.3d 450 (Nev. 2002) 17

Nebraska v. Gales, 265 Neb. 598 (2003) 21

Oken v. State, 835 A.2d 1105 (Md. 2003) 20

Olsen v. State, 2003 WY 46 (Wyo. 2003) 19, 28

People v. Ballard, 206 Ill. 2d 151 (2002) 20

People v. Lewis, 43 Cal. 4th 415 (2008) 20

Ritchie v. State, 809 N.E.2d 258 (Ind. 2004) 21

State v. Anderson, 2008 La. LEXIS 1744, p. 102 (La. 2008) 22

State v. Fry, 126 P.3d 516 (N.M. 2005) 21

State v. Lovelace, 90 P.3d 298 (Idaho 2004)..... 19

State v. McLaughlin, 265 S.W.3d 257 (Mo. Banc 2008) 5, 7, 13, 31

State v. Ring, 204 Ariz. 534 (Ariz. 2003)..... 17

State v. Rizzo, 266 Conn. 171, 242 (2003)..... 18

State v. Whitfield, 107 S.W.3d 253 (Mo. 2003).....*passim*

State v. Zink, 181 S.W.3d 66 (Mo. banc 2005)..... 5

Torres v. State, 58 P.3d 214 (Ok. Crim. 2002) 22

Ex parte Waldrop, 859 So.2d 1181 (Ala. 2002) 20

Woldt v. People, 64 P.3d 256 (Colo. 2003)..... 18

CONSTITUTIONAL PROVISIONS AND STATUTES:

United States Constitution

Sixth Amendment ..... *passim*
Eighth Amendment ..... *passim*
Fourteenth Amendment ..... i, 2, 3, 6, 12, 30

United States Code

28 U.S.C. § 1257(a) 1

AR ST § 5-4-603 19
K.S.A. § 21-4624 (2006)(Kansas) 19
RSMo 565.030.4 ..... 1, 5, 26
Ohio Rev. Code 2929.03(D) 19
Tenn. Code Ann. 39-13-204 19
Utah Code Ann. 76-3-207 19
RCW 10.95.060 (Washington) 19

OTHER AUTHORITIES:

Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091 (2003) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott McLaughlin respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court in this case.

OPINION BELOW

The opinion of the Missouri Supreme Court is reported at 265 S.W.3d 257 (Mo. Banc 2008), and is reprinted in the Appendix at Pet. App. A. 1a-42a. The denial of rehearing is attached in the Appendix at Pet. App. B. 43a-44a.

JURISDICTION

The opinion of the Missouri Supreme Court was entered on August 26, 2008. That court denied McLaughlin's timely petition for rehearing on September 30, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury[.]

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

Section 565.030.4 of the Missouri Revised Statutes provides in relevant part:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
>
> (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence

> supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

STATEMENT OF THE CASE

The two questions presented by this case encompass interrelated issues. First, where state law conditions death eligibility upon the outcome of the weighing determination, whether the finding that mitigating evidence weighs less than aggravating evidence must be submitted to a jury, and proved (by the state) beyond a reasonable doubt. Second, regardless of *Apprendi*'s applicability, whether the requirement that the defendant demonstrate to a unanimous jury that mitigating evidence outweighs aggravating evidence is incompatible with the heightened reliability that the Eighth and Fourteenth Amendments demand in capital sentencing proceedings.

In *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000), the Court held that the Sixth Amendment right to a jury trial requires all facts "that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved [by the state] beyond a reasonable doubt."

Two years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Court applied the *Apprendi* rule to Arizona's capital sentencing scheme, and held that a

jury—and not a judge—must determine the existence of any aggravating factor. The *Ring* Court explained that a conviction for first-degree murder does not by itself render a person eligible for death. Instead, a defendant has to be found guilty of murder plus one, meaning the state must secure a first-degree murder conviction and also prove the existence of at least one aggravating factor by proof beyond a reasonable doubt.[1] *Id.* at 609.

Under the Missouri scheme at issue here, a defendant is not eligible for a death sentence until the jury has found him guilty of murder and has made two additional factual findings: that a statutory aggravating circumstance applies beyond a reasonable doubt; and, the mitigating evidence is not stronger than the aggravating evidence.

In *State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. banc 2003), the Missouri Supreme Court held that the outcome of the weighing of aggravating and mitigating evidence, no less than the finding of a statutory aggravating circumstance, is a "prerequisite[] to the trier of fact's determination that a defendant is death-eligible." Accordingly, the court found that a jury—not a judge—must conduct the weighing step. *Id.* at 261-62 (the fact that the judge made the weighing determination "clearly violated the requirement of *Ring* that the jury rather than

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[1] *Ring* did not reach whether a jury must make any capital sentencing determination above the existence of an aggravating factor. *Id.* at fn 4. (noting that petitioner's claim was "tightly delineated" and "contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him.").

the judge determine the facts on which the death penalty is based.").

Though the Missouri Supreme Court ostensibly found the *Apprendi* rule applicable to the weighing determination, in petitioner's case that court held that the defendant—rather than the state—must bear the burden of persuading a unanimous jury that the mitigating evidence outweighs aggravating evidence. *State v. McLaughlin*, 265 S.W.3d 257, 268 (Mo. banc 2008) ("this Court reaffirms its holding in [*State v.*] *Zink* [181 S.W.3d 66 (Mo. banc 2005)] that under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence.") In sum, Missouri applies the jury submission portion of the *Apprendi* rule, but eschews the inseparable requirement that it is the state that must prove against the defendant, beyond a reasonable doubt, the existence of any fact that raises the punishment ceiling.

Fifteen other state courts of last resort and four federal courts of appeal have addressed, and are conflicted over, whether and how the *Apprendi* rule affects the weighing stage of their respective capital sentencing statutes. The division in the lower courts is entrenched and their holdings are outcome-determinative in capital cases.

Of the states that have concluded that a defendant is not eligible for a death sentence unless the mitigating evidence is insufficient to outweigh the aggravating evidence, Missouri alone requires the defendant to bear the burden of persuasion at the weighing stage. Assignment of the burden of persuasion to the defense at a death-eligibility stage

conflicts with this Court's Sixth, Eighth, and Fourteenth Amendment jurisprudence.

This court should grant review to resolve the conflict below, and to clarify that any sentencing determination that has the effect of increasing the maximum penalty from life imprisonment to a death sentence must be submitted to a jury, and proved by the state beyond a reasonable doubt.[2]

This Court should also grant review to address whether a capital scheme that taxes the defendant with the burden of proving to a unanimous jury that he is not death-eligible is inconsistent with this Court's Eighth and Fourteenth Amendment jurisprudence and the need for heightened reliability in capital sentencing.

1. *Legal Background.* Missouri's capital sentencing statute requires three distinct determinations before the state can impose a death sentence: (1) A statutory aggravating factor must exist, (2) Any mitigating evidence must not outweigh the aggravating evidence, and (3) In any event, death must be the appropriate punishment. *Whitfield*, 107 S.W.3d at 261. The death penalty is not a sentencing option unless the jury decides the first two steps against the defendant. At the weighing step, to obtain a sentence of life imprisonment, the defendant must demonstrate to a unanimous jury that the mitigating evidence outweighs the aggravating evi-

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[2] This case does not implicate *Proffitt v. Florida*, 428 U.S. 242 (1976) or *Harris v. Alabama*, 513 U.S. 504 (1995), both of which permit a judge to make the sentencing determination once a jury makes the findings necessary to render a person death-eligible.

dence. If even a single juror finds the mitigating evidence insufficient, the defendant becomes death-eligible and the jury moves to the final step, where it determines whether death is the appropriate punishment. Again, the burden of persuasion (unanimous) rests with defendant. If the jury deadlocks on the final, selection step (but not before), the circuit court imposes the sentence. *McLaughlin*, 265 S.W.3d at 264.

2. Petitioner's jury found one of the four statutory aggravating factors submitted but did not unanimously determine that the evidence in mitigation outweighed the aggravating evidence. Pet. App. C. 46a. The jury then deadlocked on the separate question of whether death was the appropriate punishment. Though as many as eleven of the twelve jurors may have found that the mitigating evidence outweighed the aggravating evidence (and thus that life was the appropriate sentence), the circuit court judge reconsidered all of the facts and sentenced petitioner to death. *McLaughlin,* 265 S.W.3d at 264 ("The judge below did not err in reconsidering the facts and determining that under all of the circumstances death should be imposed.").

3. *Factual Background.* On the evening of November 22, 2003, St. Charles police officers arrested Mr. McLaughlin as he arrived at a hospital in search of medication to treat his deteriorating mental illness. T. 1052-58, 1061-63. Mr. McLaughlin was charged with the first-degree murder and forcible rape of Beverly Guenther, his on-again, off-again girlfriend. T. 803, 813, 819, 832.

Though Mr. McLaughlin and Ms. Guenther had broken things off before, this latest time

Guenther indicated that she was truly calling it quits. T. 816, 821-22.[3] Nonetheless, Mr. McLaughlin desperately hoped to win her back. Mr. McLaughlin, distraught and sobbing at his grandfather's burial the day before Guenther's death, told his relatives "he didn't know what to do [about Beverly], but he loved her, and that she was messing with his head." T. 1609. Though his family advised him to "leave it alone ... let her go," Mr. McLaughlin felt "he couldn't because he loved her," T. 1032, 1039, and "his life would be over if he couldn't have her." T. 1609.

On the night of November 20, 2003, Mr. McLaughlin waited outside Guenther's place of work in hopes that he could talk to her. State Exhibits 70, 71, 71A. When Guenther rejected his plea, telling him to "get out of here," Mr. McLaughlin lost control. *Id.*

When detectives asked Mr. McLaughlin why he killed Guenther, he said, "I have no idea. I've never done something like this before." *Id.* One detective that interviewed Mr. McLaughlin described how McLaughlin "put his hands to his head and [] was crying, and [] told us that she was dead and that he had dumped her in the river." T. 1185.

Mr. McLaughlin offered his full cooperation to the police—even leading detectives to the place where Guenther's body was located. T. 1185-89. Acknowledging responsibility, and remorseful, Mr.

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[3] Petitioner moved out of Guenther's house, a restraining order was taken out against him, and burglary charges were filed when he was found entering Guenther's house to remove some of the belongings he had left there. T. 927-34, 1645-46.

McLaughlin left the following message on Guenther's employer's answering machine: "Ken and Judi, I just wanted to say I am sorry for what I did, and I am ashamed of it." T. 807-10.

4. *Proceedings Below*. The guilt phase of Mr. McLaughlin's trial began on September 25, 2006. LF. at 15. The jury began deliberating on September 27, 2006, and found Mr. McLaughlin guilty of first-degree murder and rape on September 28, 2006. *Id.* The penalty phase of the trial began that same day. The jury found one of the four statutory aggravators submitted—that the crime involved "depravity of mind." Pet. App. C. 46a-47a.

Mr. McLaughlin introduced extensive mitigating evidence touching upon his poor mental health, impaired intellectual functioning, and the trauma he suffered through his developmental years.

The jury learned that from birth to age three Mr. McLaughlin lived solely with his mother (who was working as a prostitute at the time) because his father, who was an alcoholic, had abandoned him. T. 1545. He bounced between several foster homes and various relatives until his adoptive parents, the McLaughlins, took custody of him at age five. T. 1545-46. His adoptive mother's description of him "as a clingy child who always needed to know where his parents are at all times, especially his mother" indicated "significant insecurity and anxiety" which was corroborated by his inability to fall asleep until his adoptive father returned home each night. T. 1548-49.

Petitioner's behavioral problems skyrocketed. When petitioner was in third grade, his elementary

school counselor documented the severity of his psychological state:

> I would evaluate Scott's psychological problems as being extremely serious. I have worked as an elementary school counselor for nine years in three different schools and had to deal with some very serious cases. Scott's is the most serious of all.

T. 1730.

Mr. McLaughlin's traumatic home-life exacerbated his mental decline. The McLaughlin house was known as the "House of Horrors." T. 1615-16, 1618. The children had to sit in chairs until Harlan, their adoptive father, got home from work and paddled them with a homemade "board of education." T. 1913-14. Harlan was a police officer and, as Scott got older, sometimes used his taser and nightstick on him. T. 1913, 1920. The McLaughlins locked the refrigerator and cabinets to keep the children from getting to the food. T. 1916. If the cats gave birth to kittens, Louise, petitioner's adoptive mother, made the children drown them. T. 1916-17.

When Mr. McLaughlin was nine years old, Psychologist Anthony Udziela and Dr. Pasquale Accardo, a physician specializing in developmental pediatrics, evaluated Mr. McLaughlin at Knights of Columbus Developmental Center (KCDC) at Cardinal Glennon Children's Hospital in St. Louis because of concerns that "he might have neurological issues." T. 1541. The KCDC medical team diagnosed Mr. McLaughlin with neurological brain damage, a "striking" attention deficit disorder with hyperactiv-

ity, a specific learning disability with a developmental disorder of expressive language, and "significant issues with attachment and basic trust and mistrust that were associated with the very significant neglect and erratic first five years of his life" which "markedly affected his development and had a major impact on him resulting in an adjustment disorder with depressed features." T. 1554.[4] McLaughlin's verbal IQ score of 74 on the revised Wechsler Intelligence Scale for Children fell in the borderline retarded range. T. 1552.[5]

In response to a doctor's question of what he wanted to do when he grew up, then nine-year old petitioner gave "[p]robably one of the most bizarre answers" the doctor had ever heard: "he wanted to be dead." Def.Ex.E, 33. This "strikingly unguarded... response... support[ed] a diagnosis of a depressive syndrome." Def.Ex.E, 34-35.

Mr. McLaughlin's early-diagnosed mental illness would continue to haunt him during his adult life—requiring expensive medication that he often

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[4] Subsequent testing by Dr. Pasquale Accardo confirmed brain impairment. Def.Ex.E, 21-23. On the "Rey-Osterreith" complex figure-drawing test, used to assess brain damage, Mr. McLaughlin's score was below the lowest possible chronological adjustment score of five years old. Def.Ex.E, 25-26. On the Visual Auditory Digit Span test, his ability to repeat numbers spoken or said to him was at the level of a six-year-old. Def.Ex.E, 28-29. His ability to repeat them backwards was at the seven-year level. *Id.*

[5] His full scale IQ of 82 placed him in the low average range. T. 1552. Subsequent testing between the ages 9 and 17 revealed IQ scores of 73, 79, 75, and 77 that were "clearly deficient in nature" and "bumping right up against the mentally retarded range." *Id.*

could not afford and causing at least one week-long stay at a mental hospital. T. 1639, 1657-60.

The twelve jurors did not unanimously conclude that the mitigating evidence outweighed the evidence in aggravation. Pet. App. C. 46a. Roughly five and one-half hours after beginning sentencing deliberations, the jury returned with a verdict of "unable to decide or agree upon the punishment." T. 1998-2000. The trial judge imposed a sentence of death.

The trial court judge overruled Mr. McLaughlin's timely motion for new trial, as well as his motion for imposition of a sentence of life imprisonment without probation or parole. T. 2005-06.

5. Mr. McLaughlin appealed his conviction and death sentence to the Missouri Supreme Court. Among his allegations of error, Mr. McLaughlin contended the Missouri sentencing scheme contravened this Court's holdings in *Ring* and *Apprendi*. App.Br. 50-56. Specifically, Mr. McLaughlin alleged that if the weighing step of the state sentencing statute constituted a factual determination, as the state court had previously held, then it was error to place the burden of persuasion on petitioner rather than on the state. App.Br. 50-60. Petitioner also alleged as error Missouri's failure to apply the beyond a reasonable doubt standard to the weighing step of the sentencing statute. App.Br. 51. Petitioner rested the argument that his death sentence should be vacated on Sixth, Eighth, and Fourteenth Amendment grounds, as well as on the need for reliability in capital sentencing. *Id.*

On August 26, 2008, the Missouri Supreme Court affirmed petitioner's death sentence. The Court held that "under section 565.030.4(3) [of the state capital sentencing statute] the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence." *McLaughlin*, 265 S.W.3d at 268. The Missouri Supreme Court further found the state scheme's requirement – that to impose a life sentence, the jury must unanimously decide the mitigating evidence outweighs the aggravating evidence – satisfied the *Apprendi* fact-finding requirement. *Id.* at 264.

The Missouri Supreme Court states clearly that *Apprendi* and *Ring* apply to the weighing stage, but does not appear to have contemplated that the allocation of the burden of persuasion to the defense—by a unanimous margin, no less—facially conflicts with the *Apprendi* mandate that every factual determination that has the effect of increasing the maximum possible punishment be submitted to a jury, and proven by the state beyond a reasonable doubt.

After rejecting Mr. McLaughlin's Sixth and Eighth Amendment claims, the Missouri Supreme Court affirmed his conviction and death sentence. Pet. App. A. 42a.

6. In his timely application for rehearing, Petitioner reiterated that the burden of persuasion at the weighing step must rest with the state, beyond a reasonable doubt, if, as the Missouri Supreme Court held in *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), that step constitutes a factual finding prerequisite to death eligibility:

> Even if this Court had never issued *State v. Whitfield*, 107 S.W.3d 253 (Mo. banc 2003), as a matter of constitutional due process, the death-eligibility steps of Section 565.030.4(2) and (3), RSMo. (Supp. 2007), would still have to be proved by the state, against the defendant, to establish the defendant's eligibility for the sentence of death. This Court has said that §565.030.4(3) is a death-eligibility step. *Whitfield, supra.* The state, then, must prove this death-eligibility fact against the defendant.
>
> Requiring the defendant to bear the burden of establishing to a unanimous jury that the mitigating circumstances outweigh the aggravating circumstances stands *Ring* on its head. Because the Missouri legislature, as this Court recognized in *Whitfield*, has established two factual findings that must be made to enhance the defendant's sentence from life to death, it follows that the state must bear the burden as to those steps.

Rehr'g.Mot. at 8-11 (internal citations omitted).

The Missouri Supreme Court denied the application for rehearing on September 30, 2008. Pet. App. B. 43a. This petition ensues.

REASONS FOR GRANTING THE WRIT

The Missouri Supreme Court ruling in this case reflects the persistent confusion in the lower courts over whether and how the *Apprendi* rule applies to the weighing of aggravating and mitigating evidence. *See, e.g.*, Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 Ala. L. Rev. 1091, 1121 (2003) ("In the wake of *Ring*, the inevitable next questions for resolution are whether the *Ring* rationale requires a jury also to make the . . . assessment whether aggravating circumstances outweigh mitigating circumstances."); *Duest v. State*, 855 So. 2d 33, 50 (Fla. 2003) (Pariente, J., specially concurring) ("those cases [addressing the applicability of *Ring* to the weighing determination] . . . illustrate that *Ring* has raised at least as many questions in the state courts as it has answered.").

This Court should use this case to resolve the issue. By finding that the *Apprendi* rule applies to the weighing step of Missouri's capital sentencing scheme, but nonetheless holding that it is the defendant who (at this step) must persuade the jury that he is not death-eligible, the Missouri Supreme Court seriously clouds the bright-line *Apprendi* rule. Moreover, the Missouri Supreme Court's reading of *Apprendi* and *Ring* has grave practical implications for capital defendants. A lone juror who deems the mitigating evidence to be insufficient renders the defendant death-eligible. If the same juror (again acting alone) also finds death to be the appropriate pun-

ishment, she bestows the presiding judge with the power to impose a death sentence.[6]

The opinion below (and thus the rule applicable to all Missouri capital trials) cannot be reconciled with the Sixth Amendment regardless of the angle from which one views it—either *Apprendi* applies to the weighing stage, and the state court improperly placed the burden of persuasion on the defense, or the decision below incorrectly applied *Apprendi* to the weighing determination. In either event, this case warrants plenary review.[7]

States and federal courts have had ample time to address whether the Sixth Amendment applies to the weighing determination at the sentencing phase of a capital trial, and those that have are deeply and openly divided over whether, how, and why *Apprendi* is applicable. The answer to this question is of fundamental importance to the administration of capital punishment throughout the country. The courts below have framed the issue and it is exceedingly improbable that further percolation will do anything to ease the tension. This Court should step-in to settle the conflict.

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[6] *Cf. McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) ("[W]e held [in *Mills v. Maryland*, 486 U.S. 367 (1988)] that it would be the 'height of arbitrariness' to allow or require the imposition of the death penalty where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence.").

[7] *See Kansas v. Marsh*, 548 U.S. 163, 183 (2006)(Scalia, J., concurring) ("Our principal responsibility under current practice, however, and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, §2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law.").

I. THE STATE AND FEDERAL COURTS ARE IRRECONCILABLY CONFLICTED.

A. Four State Courts of Last Resort Find *Apprendi* Applicable to the Weighing of Aggravating and Mitigating Evidence.

On remand from this Court's decision in *Ring v. Arizona*, the Arizona Supreme Court rejected the state's contention that the *Apprendi* rule did not apply to the weighing stage of the state sentencing statute. As the court explained,

> In both the superseded and current capital sentencing schemes, the legislature assigned to the same fact-finder responsibility for considering both aggravating and mitigating factors, as well as for determining whether the mitigating factors, when compared with the aggravators, call for leniency. Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency.

State v. Ring, 204 Ariz. 534 (Ariz. 2003)(*Ring II*).

The Nevada Supreme Court, in *Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002), held the *Apprendi* rule applicable to the weighing step of its capital sentencing scheme. The court explained the "finding [that there are no mitigating circumstances that outweigh the aggravating circumstances] is

necessary to authorize the death penalty in Nevada, and [concluded] that it is in part a factual determination, not merely discretionary weighing." *Id.* "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact," the Nevada Supreme Court continued, "that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.* (internal quotations omitted).

In *Woldt v. People*, 64 P.3d 256, 265 (Colo. 2003) (en banc), the Colorado Supreme Court found "unconstitutional on its face under *Ring*" the portion of the state sentencing scheme whereby a "three-judge panel decided whether the mitigating factors outweighed the aggravating factors . . ." *Id.* The Colorado Supreme Court held that a unanimous jury – and not a three-judge panel – must "be convinced beyond a reasonable doubt that any mitigating factors did not outweigh the proven statutory aggravating factors." *Id.* at 265.

The Missouri Supreme Court, in *State v. Whitfield*, held that *Ring* applies to the weighing stage of the state's capital sentencing scheme. 107 S.W.3d at 261. In *Whitfield*, the defendant's death sentence was reversed because the "trial judge erred in himself making the factual determination [that the evidence in mitigation did not outweigh the aggravating evidence] that [is] predicate to imposition of Missouri's death penalty." *Id.* at 261.

The Connecticut and Wyoming Supreme Courts interpret their state statutes so as to comply with *Apprendi* and *Ring*. *See State v. Rizzo*, 266 Conn. 171, 242 (2003) (finding "the jury must be instructed that its level of certitude be beyond a rea-

sonable doubt when determining that the aggravating factors outweigh the mitigating factors . . ."); *Olsen v. State*, 2003 WY 46, 67 (Wyo. 2003) ("If the jury is to be instructed to "weigh" . . . *the burden of negating this mitigating evidence by proof beyond a reasonable doubt remains with the State.*" (emphasis supplied)). An additional seven state schemes legislatively impute the *Apprendi* rule into their sentencing determinations. *See, e.g., State v. Lovelace*, 90 P.3d 298, 301 (Idaho 2004) ("Subsequent to the *Ring* decision, the legislature revised Idaho's capital sentencing statutes, requiring that a jury find and consider the effect of aggravating and mitigating circumstances in order to decide whether a defendant should receive a death sentence").[8]

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[8] *See also* Ohio Rev. Code 2929.03(D) (jury [must] unanimously find[], by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors; AR ST § 5-4-603 (Arkansas) (jury [must] unanimously returns written findings that . . . aggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances found to exist . . . Aggravating circumstances justify a sentence of death beyond a reasonable doubt.); Tenn. Code Ann. 39-13-204 (g) (1) (B) (If the jury unanimously determines that a statutory aggravating circumstance [exists], but that such circumstance or circumstances have not been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt, the jury shall. . . sentence the defendant... to. . . life.); Utah Code Ann. 76-3-207 (5) (b) (death penalty shall only be imposed if. . . the jury is persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation); RCW 10.95.060 (Washington) (jury must be convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency); K.S.A. § 21-4624 (2006) (Kansas) (death penalty not imposed unless "by unanimous vote, the jury finds beyond a reasonable doubt . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist . . .").

B. In Direct Contrast, the Majority of State and Federal Courts Find *Apprendi* Inapplicable to the Weighing of Aggravating and Mitigating Evidence.

Six state courts of last resort hold that the *Apprendi* rule does not apply because the weighing process is not a factual determination. The Illinois Supreme Court, in *People v. Ballard*, 206 Ill. 2d 151 (2002), addressed whether it was "inaccurate to conclude that the death penalty is authorized by the facts found by the jury after the first stage of death penalty proceedings, because this second finding must still be made, unanimously, before that penalty can be imposed." *Id.* at 203. The Court noted that defendant's argument "appears to find some support in *Ring*," and that it was not "beyond question" that the weighing of aggravating and mitigating evidence constituted a "factual" determination. *Id.* at 204. Ultimately, however, the Court distinguished *Ring* because Ballard's "complaint concerns mitigating, not aggravating, factors." *Id.* The Court concluded that though it was bound by this Court's precedents, it was "not bound to extend the decisions." *Id.*; *see also Ex parte Waldrop*, 859 So.2d 1181, 1189 (Ala. 2002) ("weighing process is not a factual determination," but instead "a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum"); *accord People v. Lewis*, 43 Cal. 4th 415 (2008) ("[t]here is no federal constitutional requirement that a jury [] conduct the weighing of aggravating and mitigating circumstances . . ."); *Oken v. State*, 835 A.2d 1105, 1151-52 (Md. 2003) ("the weighing process is not a

fact-finding one based on evidence.")[9]; *Commonwealth v. Roney*, 866 A.2d 351, 360 (Pa. 2005) ("[b]ecause the weighing of the evidence is a function distinct from fact-finding, *Apprendi* does not apply here."); *State v. Fry*, 126 P.3d 516, 531-36 (N.M. 2005) ("balancing process is not a fact necessary to constitute the crime with which [the defendant] is charged such that it would invoke the constitutional requirement of proof beyond a reasonable doubt . . .").

Five state courts of last resort hold that *Ring* is inapplicable because the weighing function does not increase the maximum punishment. *See Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004) ("The outcome of weighing does not increase eligibility . . . [and] is therefore not required to be found by a jury under a reasonable doubt standard.")[10]; *accord Brice v. State*, 815 A.2d 314, 322 (Del. 2003) ("the weighing . . . does not increase the punishment [but] ensures that the punishment imposed is appropriate and proportional."); *Nebraska v. Gales*, 265 Neb. 598, 627-628 (2003) ("These [weighing] determinations cannot increase the potential punishment to which a defendant is exposed as a consequence of the eligibil-

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[9] *But see Evans v. State*, 886 A.2d 562, 580 (Md. 2005) (Raker, J., dissenting, joined by Bell, C.J., Greene, J.) ("The balancing of the aggravating and mitigating factors, however, is a factual finding of the sort *Ring* and *Apprendi* require to be proved beyond a reasonable doubt.").

[10] *But see Ritchie*, 809 N.E. 2d at 273 (Rucker, J., dissenting in part, concurring in part) ("The plain language of Indiana's capital sentencing scheme makes death eligibility contingent upon certain findings that must be weighed by the jury . . . they are at a minimum the type of findings anticipated by *Apprendi* and *Ring* and thus require proof beyond a reasonable doubt.").

ity determination.); *Torres v. State*, 58 P.3d 214, 216 (Ok. Crim. 2002) (It is [the aggravating factor] finding, not the weighing of aggravating and mitigating circumstances, that authorizes jurors to consider imposing a sentence of death."); *State v. Anderson*, 2008 La. LEXIS 1744, pp. 102-103 (La. 2008) (rejecting defendant's claim that a determination of deathworthiness requires proof beyond a reasonable doubt, and finding that *Ring* applied to "predicate facts" and not the "ultimate sentence.").

Four federal courts of appeal similarly refuse to apply *Apprendi* to the weighing of aggravating and mitigating evidence. In *United States v. Mitchell*, 502 F.3d 931, 993 (9th Cir. 2007),[11] the Ninth Circuit held, over the dissent of Judge Reinhardt, that the beyond a reasonable doubt standard does not apply at the weighing stage because "the jury's task is no longer to find whether factors exist; rather, each juror is to "consider" the factors already found and to make an individualized judgment whether a death sentence is justified." The Court further explained "the weighing step is an equation that merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate." *Id.*; *see also United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007) ("the requisite weighing [provision of the Federal Death Penalty Act] constitutes a proc-

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[11] In dissent, Judge Reinhardt underscored that "[t]here is no doubt that the finding that aggravating factors outweigh mitigating factors increased Mitchell's maximum punishment [under the Federal Death Penalty Act]." *Mitchell*, 502 F.3d at 1011. "Absent this finding," Judge Reinhardt reasoned, "the maximum sentence the court could have imposed would have been life imprisonment without the possibility of release." *Id.* at 1012.

ess, not a fact to be found . . . Hence, the weighing of aggravators and mitigators does not need to be "found."); *United States v. Fields*, 483 F.3d 313, 346 (5th Cir. 2007) ("the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact [but rather] it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves." (internal quotations omitted)); *accord United States v. Barrett*, 496 F.3d 1079, 1107-08 (10th Cir. 2007) (same).

C. The Opinion Below Cannot Be Reconciled with this Court's Sixth Amendment Jurisprudence or the Decision of any other Court that has Addressed this Issue.

The Missouri Supreme Court's holding that, though the *Apprendi* rule applies, the state sentencing scheme properly places the burden of persuasion on the defendant at the weighing stage cannot be reconciled with this Court's *Apprendi* decision. The *Apprendi* rule consists of at least three separate and indispensable elements: (1) The state must submit any fact that increases the sentencing ceiling, (2) to a jury, (3) and prove that fact beyond a reasonable doubt. The effect of the Missouri Supreme Court's opinion is to treat submission to the jury as the entirety of the *Apprendi* rule, dispensing with the requirements that the burden of persuasion be placed on the state and that the fact be proved beyond a reasonable doubt. This is incorrect. Either *Apprendi* does not apply, and the burden of persuasion can be placed on the defendant; or *Apprendi* applies, and the burden must fall on the state. This Court's jurisprudence cannot stand for both propositions.

Nor can the opinion below be reconciled with the decision of any state or federal court to address whether *Apprendi* applies to the weighing step of a capital sentencing scheme. The conflict is apparent between the Missouri Supreme Court's holding that *Apprendi* applies and the holdings of courts that find *Apprendi* inapplicable. Among the states that apply the *Apprendi* rule to the weighing of aggravating and mitigating evidence, only Missouri dispenses with the requirement that the state bear the burden of proving this step beyond a reasonable doubt.

II. Placing the Burden of Persuasion on the Prosecution at the Weighing Step Comports with this Court's Sixth Amendment Jurisprudence.

1. *Apprendi* announced that all facts "that increase[] the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* The *Apprendi* majority specifically excluded capital sentencing schemes from the newly enunciated rule – thereby affirming *Walton v. Arizona* – by characterizing the choice between life and death as one between sentences within a range of punishment preauthorized by the guilty verdict.

In dissent, Justice O'Conner painted the majority's pre-authorization reasoning as "demonstrably untrue." *Apprendi*, 530 U.S. at 484 (O'Connor, J., dissenting). Justice O'Connor explained that, "under Arizona law, a defendant convicted of first-degree murder can be sentenced to death *only if* the judge finds the existence of a statutory aggravating factor." *Id.* at 483 (emphasis in original).

In *Ring*, the Court obliterated the distinction between guilt and sentencing phase determinations: "Capital defendants, no less than non-capital defendants, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589. Because life imprisonment is the maximum punishment a defendant could receive on a guilty verdict alone, the *Ring* Court concluded that the existence of an aggravating factor – a fact prerequisite to imposition of a death sentence – must be determined by a jury on proof beyond a reasonable doubt. *Id.*

2. The weighing of aggravating and mitigating evidence serves a similar function to the finding of an aggravating factor: both determinations are prerequisites to the imposition of a death sentence. The trier of fact is not authorized to impose a death sentence in any state that uses the weighing step unless and until a determination has been made that mitigating evidence does not outweigh the evidence in aggravation. *See Blakely v. Washington*, 542 U.S. 303-304 (2004) (the "statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.").

The Missouri scheme at issue here highlights the point. If the trier of fact determines that mitigating evidence weighs more than aggravating evidence, then the defendant is automatically sentenced to life. However, if the aggravating evidence outweighs mitigating evidence, the defendant does not automatically receive a death sentence. Instead, the trier of fact moves to the final sentencing step where it can (again unanimously) "decide[] under all of the circumstances not to assess and declare the punish-

ment at death." 565.030.4(4). As the Missouri Supreme Court explained:

> As under Colorado's statute, it is not until this fourth step that the trier of fact is given discretion to make the final determination whether to give a life sentence even if he or she has already found that the aggravators and mitigators would qualify defendant for imposition of the death penalty. As in Colorado, Missouri is considered a non-weighing state because of the discretion given to the jury at this point to impose a life sentence without regard to the weight it gave to aggravators and mitigators it found.

Whitfield, 107 S.W.3d at 261 Thus, the weighing determination is prerequisite to, but not coterminous with, the ultimate question of whether to impose a death sentence. Because a death sentence cannot be imposed without the additional finding that mitigating evidence is not sufficient to outweigh aggravating evidence, life imprisonment is the maximum sentence that can be imposed after the finding of at least one aggravating factor.

The Court's opinion in *Sattazahn v. Pennsylvania,* further illustrates why the *Apprendi* rule should apply to the weighing of aggravating and mitigating evidence. Sattazahn's jury deadlocked "without reaching a decision on death or life, and without making any findings regarding aggravating or mitigating circumstances." 537 U.S. 101, 112 (2003). Pursuant to the state statutory scheme, a default sentence of life-imprisonment was entered. On

retrial, the jury sentenced Sattazahn to death. This Court held that a hung jury at the sentencing phase did not trigger double jeopardy protections. Justice Scalia, writing for the majority, explained that if the jury had made a finding that no aggravating factor existed, then "double-jeopardy protections [would have] attach[ed] to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).'" *Id.* If *Apprendi* does not apply to the weighing step, then a jury's finding that the mitigating evidence outweighed the aggravating evidence – and the corresponding life sentence that would be imposed upon that determination – would not be subject to double jeopardy protection. *See Id.* at 111 ("We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an "offence" for purposes of the Fifth Amendment's Double Jeopardy Clause."). The inequity in such a result is apparent.

3. Several state courts of last resort frame the weighing step as a process – rather than a factual determination – and thus refuse to apply the *Apprendi* rule. While the balancing itself is a "process," the outcome of that process is the relevant factual finding that renders a person eligible (or not) for a death sentence. Whether a state wants to call the weighing stage a factual-finding, a moral determination, or "Mary Jane," the simple fact is a state's ability to impose a death sentence *depends* on the outcome of the weighing process. *Ring*, 536 U.S. at 610 (Scalia, J., concurring) (" . . . all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary

Jane—must be found by the jury beyond a reasonable doubt.").

Nor does categorizing the weighing determination as a moral rather than factual finding save it from *Apprendi*'s grasp. First, the fact that many states assign an evidentiary value to the weighing determination suggests that it is a factual finding. *See, e.g.*, *Evans*, 886 A.2d 580 (Raker, J., dissenting) ("[T]he General Assembly has provided for a burden of proof in the weighing process. Such standards of proof are reserved customarily for factual findings."); *cf. Olsen*, 2003 WY 46 at 67 ("that aggravating circumstances be proved beyond a reasonable doubt and mitigating circumstances be proved by a preponderance of the evidence references burdens assigned to factual issues.").

Moreover, this distinction disintegrates because the intrinsically moral determination of whether petitioner's offense was "heinous, atrocious, or cruel" marked the sole aggravating factor relied on by the judge to sentence petitioner to death. *See also Schriro v. Summerlin*, 542 U.S. 348, 361 (2004) (Breyer, J., dissenting) ("The leading single aggravator charged in Arizona [] requires the factfinder to decide whether the crime was committed in an 'especially heinous, cruel, or depraved manner.'").[12]

Finally, morality based fact-finding serves to narrow the universe of offenders for whom the death penalty is appropriate, and thus performs an inte-

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[12] *Id.* ("Words like "especially heinous," "cruel," or "depraved"--particularly when asked in the context of a death sentence proceeding--require reference to community-based standards, standards that incorporate values.").

gral function under this Court's Eighth Amendment jurisprudence. *See California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (rendering of a death sentence must be "directly related to the personal culpability of the criminal defendant," and "reflect a reasoned moral response to the defendant's background, character, and crime."). Though the penalty phase of a capital trial did not exist at the time of the founding, this Court's heightened requirements under the Eighth Amendment have had the effect of altering the jury trial landscape.[13] A defendant's Sixth Amendment right to a jury trial cannot be diluted on the theory that these newly required sentencing proceedings did not exist at the time of the founding.[14] If this Court chooses to compile additional requirements for the imposition of the death penalty, the Sixth Amendment right to a jury trial must be extended to correspond with all adversarial findings – including the weighing determination at issue here – that function in the same manner as a finding at the guilt phase.

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[13] *See Ring*, 536 U.S. at 611 (Scalia, J., concurring) ("[I]t is impossible to identify with certainty those aggravating factors whose adoption has been wrongfully coerced by *Furman*, as opposed to those that the State would have adopted in any event.").

[14] *See Apprendi*, 530 U.S. at 484 (O'Connor, J., dissenting) (the idea "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.").

III. The Eighth and Fourteenth Amendments Limit Imposition of Capital Punishment to Instances Where the State Demonstrates that Mitigating Evidence is Insufficient to Warrant Life Imprisonment.

1. Missouri has chosen to require the sentencing jury to conclude that mitigating evidence does not outweigh aggravating evidence *before* a person is eligible to receive a death sentence. *Whitfield*, 107 S.W.3d at 261. Because persons with sufficient mitigating evidence are "less blameworthy, [and] are subject to [a] substantially less severe penalt[y]," the state must bear the burden of persuasion at the weighing step. *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975)("[W]here one party has at stake an interest of transcending value . . . the margin of error is reduced as to him by the process of placing on the prosecution the burden of persuading the factfinder . . .")(internal quotation omitted).[15]

2. Two terms ago, in *Kansas v. Marsh*, this Court upheld as consistent with the Eighth Amendment a state statute that requires a death sentence when aggravating and mitigating evidence are in equipoise. In that opinion, however, the Court cautioned:

> Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances—a

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[15] *See also, Id.* ("By drawing this distinction [between those who kill in the heat of passion and those who do not], while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship.").

> burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances. Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence.

Marsh, 548 U.S. at 178-79.

Like the Kansas statute at issue in *Marsh*, Missouri law requires the defendant to bear the burden of proffering a quantum of mitigating evidence greater than the amount of aggravating evidence proved by the state.[16] Unlike the Kansas statute, the Missouri scheme also requires the defendant to bear the burden of persuading all twelve jurors that mitigating evidence outweighs aggravating evidence.[17] The practical effect of where the burden of persuasion is assigned is that in Kansas a single juror's belief that mitigating evidence outweighs aggravating evidence results in a life sentence, whereas in Missouri, all twelve jurors must agree before the jury can return a life verdict.

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[16] *Walton v. Arizona*, 497 U.S. 639 (1990) permits states to place on the defendant the burden of producing enough mitigating evidence to outweigh aggravating evidence. *Walton* is inapposite to the question of whether a state can require the defendant to demonstrate to a unanimous jury that mitigating evidence outweighs aggravating evidence.

[17] *See McLaughlin*, 265 S.W.3d at 268 ("this Court reaffirms its holding in *Zink* that under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence.").

1. The Eighth Amendment requires that the administration of capital punishment be based on individualized, accurate, and consistent considerations of which few offenders among the already narrow category of murderers deserve to be sentenced to death. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (the "risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); *Id.* at 604 ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."). The Missouri statutory law at issue disregards these fundamental commands by placing the burden of persuasion on the defendant at the weighing stage thereby holding the jury's power to return a life sentence hostage to the veto power of a single juror. This arrangement reduces the likelihood that only the worst of the worst murderers will receive the death penalty, and increases the odds that capital punishment will be administered in an arbitrary and capricious manner.[18]

Given the Eighth Amendment's command that capital sentencing determinations provide assurances of heightened accuracy and consistency, the state should have to bear the risk of non-persuasion at the weighing stage. *Summerlin*, 542

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[18] *See Kennedy v. Louisiana*, 554 U.S. __, 128 S.Ct. 2641 2659-65 (2008)("resort to the [death] penalty must be reserved for the worst of crimes and limited in its instances of application"); *Gregg v. Georgia*, 428 U. S. 153, 188 (1976) (sentencing procedures must not generate "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner.").

U.S. at 362 (Breyer, J., dissenting) (the law "requires a correspondingly greater degree of scrutiny of the capital sentencing determination than of other criminal judgments")[19]; *cf. Wilbur*, 421 U.S. at 701 ("The result, in a case such as this one where the defendant is required to prove the critical fact in dispute, is to increase further the likelihood of an erroneous [determination].").

2. This Court's Eighth Amendment jurisprudence turns on the "evolving standards of human decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) To gauge society's evolving standards, this Court references "objective indicators" such as jury determinations and legislative enactment. *See, e.g., Coker v. Georgia*, 433 U.S. 584, 592 (1977).

Missouri is the only state in the country that requires a defendant to persuade a unanimous jury that the mitigating evidence warrants a life sentence. Fourteen states, as well as the District of

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[19] *See also, Id.* ("This Court has made clear that in a capital case the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case. Hence, the risk of error that the law can tolerate is correspondingly diminished"); *Baze v. Rees*, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) ("[G]iven the real risk of error in this class of cases, the irrevocable nature of the consequences is of decisive importance to me"); *Id.* ("Whether or not any innocent defendants have actually been executed, abundant evidence accumulated in recent years has resulted in the exoneration of an unacceptable number of defendants found guilty of capital offenses.").

Columbia, ban capital punishment.[20] In twenty-eight out of the thirty-five other states with valid capital punishment schemes, the state—and not the defense—must demonstrate to a unanimous jury that mitigating evidence is insufficient to warrant a life sentence.[21] In five of the six remaining states, the prosecution bears the burden of persuasion at the weighing stage.[22] In Montana, a single judge—and not the jury—determines the appropriate punishment (without reference to any particular standard).

Measuring the frequency with which capital juries actually impose a sentence of death in a particular circumstance provides a valuable on-the-ground indicator of whether a particular punishment has become cruel and unusual. *See Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (" . . . we have, in our determination of society's moral standards, consulted the practices of sentencing juries: Juries maintain a link between contemporary community values and the penal system.").[23]

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[20] See Death Penalty Information Center, Death Penalty Policy By State, available at http://www.deathpenaltyinfo.org/death-penalty-policy-state (last visited December 10, 2008).

[21] Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Tennessee, Utah, Virginia, Washington, and Wyoming

[22] Alabama, Delaware, Indiana, Maryland, Kentucky.

[23] *See also Baze v. Rees*, 128 S. Ct. 1520, 1550 (2008) (Stevens, J., concurring) ("The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive").

Yet, it can hardly be said that the belief of a single juror that life imprisonment is not warranted (especially when eleven jurors have reached the opposite conclusion) provides an accurate temperature of the "evolving standards of decency" as measured by the decisions of petit criminal juries. As a result, when appellate courts review the frequency with which Missouri juries impose a death sentence, that measure is necessarily an inaccurate thermometer for determining how much a society has chilled to the idea of executing a certain class of offenders.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

APPENDIX A

Opinion of the Supreme Court of Missouri, En Banc, dated Aug. 26, 2008 ..... 1a

APPENDIX B

Letter dated September 30, 2008 from Clerk of the Supreme Court State of Missouri to Ms. Deborah B. Wafer, Office of State Public Defender – "Appellant's motion for rehearing overruled." 43a

APPENDIX C

Verdict 45a

APPENDIX A

Supreme Court of Missouri, En Banc.
STATE OF Missouri, Respondent,
v.
Scott A. McLAUGHLIN, Appellant.
No. SC 88181.

Aug. 26, 2008.
Rehearing Denied Sept. 30, 2008.

In a death-penalty case, the Supreme Court has an independent obligation to conduct a proportionality review of the sentence, which is intended to ensure against the wanton and freakish imposition of the death penalty. V.A.M.S. § 565.035(3).

[*259] Deborah B. Wafer, St. Louis, for Appellant.

Jeremiah W. (Jay) Nixon, Atty. Gen., Roger W. Johnson, Shaun J. Mackelprang, Asst. Attys. Gen., Jefferson City, for Respondent.

LAURA DENVIR STITH, Judge.

Scott A. McLaughlin was tried and found guilty of first-degree murder. Because the jury deadlocked on the final step of the punishment phase, the question of punishment went to the trial judge, who imposed a sentence of death. Mr. McLaughlin argues that section 565.030.4 prohibited the judge from imposing any sentence but life imprisonment once the jury was unable to agree upon a punishment. He further argues it was error to instruct the jurors that they were required to unanimously agree that mitigating evidence outweighed that in aggravation in order to be required to recommend a life sentence in their re-

sponse to the second [*260] special interrogatory submitted to them in the penalty phase.

In addition, Mr. McLaughlin argues that the trial court erred in finding there was sufficient evidence to support a submission that he forcibly raped the victim, in failing to submit a felony murder instruction, in admitting evidence of prior statements by the victim about his harassing and stalking her and about the protection provided to her by the police and certain victim impact evidence, in failing to *sua sponte* prohibit certain closing argument and in rejecting certain jury instructions.

For the reasons set forth below, this Court finds no reversible error in any of the above points, finds that the sentence is proportionate to the crime as required under section 565.035.3, RSMo 2000, and affirms the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence at trial, considered in the light most favorable to the jury's verdict, shows that Scott McLaughlin and Beverly Guenther began a tempestuous relationship shortly after they met in 2002. For several months, the two lived together, but their cohabitation was marked by break-ups that were sometimes so serious that Ms. Guenther would obtain a restraining order against Mr. McLaughlin. In the spring of 2003, they ended their amorous relationship, but continued to see each other on social occasions. Throughout their relationship, Mr. McLaughlin frequently called and visited Ms. Guenther at her place of employment.

On October 27, 2003, Mr. McLaughlin was arrested and charged with burglarizing Ms. Guenther's home. He claimed that he was reclaiming things that he left at her house after they stopped living together. He was arraigned on the burglary charge on November 18, 2003.[1] Based on this incident, Ms. Guenther sought and received an order of protection against Mr. McLaughlin. On November 20, 2003, while the protective order was still in effect, he drove to Ms. Guenther's place of employment and waited for her to get off of work. When she emerged from the office, he spoke with her as she walked towards her truck.

The state presented expert testimony that the blood spatters and other physical evidence in the parking lot and truck suggested that Mr. McLaughlin at that point forced Ms. Guenther to the ground and raped her, then stabbed her repeatedly, causing a fan-shaped blood stain on the parking lot, and then dragged her body to his car and placed it in the hatchback. Mr. McLaughlin then drove to the river with the intention of disposing of her body. He tried to deposit her body in the river, but ran into some thick underbrush along the bank and left her corpse there. He then returned to sleep in his parked car because one of the tires had become flat when he stopped to dispose of the body.

The next day, Mr. McLaughlin cleaned out the inside of his car with bleach. As the day went on, he became increasingly hyperactive and nervous. Eventually, Mr. McLaughlin asked a friend to take him to a hospital in St. Charles so that he could get some medication for his mental disorder. The police were

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[1] Mr. McLaughlin eventually was found guilty by a jury of this charge and received a seven year sentence.

informed that Mr. McLaughlin was going to be at the hospital, and he was arrested when he arrived.

Mr. McLaughlin was charged with first-degree murder, forcible rape, and two counts of armed criminal action (one based [*261] on the murder, the other based on the rape). After admission of all the evidence in the guilt phase, Mr. McLaughlin moved for a judgment of acquittal on the forcible rape charge on the ground that there was no evidence that he had sex with Ms. Guenther while she was alive. The trial court overruled the motion, stating that even if the sexual intercourse occurred at the riverbank after Ms. Guenther was dead, "it's still a part of the continuous series of events that's part of the rape." On the basis of these rulings, Mr. McLaughlin requested that the trial court submit a felony murder instruction to the jury. The court refused, but did submit conventional second-degree murder.

The jury found Mr. McLaughlin guilty of first-degree murder, forcible rape, and armed criminal action based on the first-degree murder allegations. Mr. McLaughlin was acquitted of the armed criminal action charge related to the rape conviction.

At the sentencing phase, the jury heard testimony from Ms. Guenther's surviving relatives about her life and the impact of her murder upon their own lives. The jury also heard fairly extensive testimony regarding Mr. McLaughlin's abusive childhood. Mr. McLaughlin's mother was a prostitute and his father was an alcoholic. His early childhood was marked with abuse and neglect, and he bounced among foster homes until he was placed with his eventual adoptive parents, the McLaughlins, at the age of 5. The McLaughlins also took custody of his younger

brother and sister. Mr. McLaughlin continued to suffer abuse at the hands of his adoptive parents. His adoptive father was a police officer and, in addition to paddling the children with a "board of education," would use his taser and nightstick on him. The McLaughlins would also lock the cabinets so the children could not eat. Scott and his childhood friends referred to his house as "the house of horrors."

The jury also heard testimony that Mr. McLaughlin's psychological problems began manifesting themselves when he was a young boy. When Scott was nine years old, he was subjected to extensive intelligence testing because of recurring poor performance and peculiar behavior at school. The testing showed a full scale IQ of 82, which is in the low average range, and resulted in diagnoses of attention deficit hyperactivity disorder, mild neurological brain damage, learning disabilities, and "adjustment reaction of childhood with depressive features." An elementary school counselor who evaluated Scott at the age of eight wrote, "I would evaluate Scott's psychological problems as being extremely serious. I have worked as an elementary school counselor for nine years in three different schools and had to deal with some very serious cases. Scott's is the most serious of all." During the penalty phase, Mr. McLaughlin also sought to show that his brother helped him dispose of the body, but the trial court rejected this testimony.

After hearing all the evidence, the jury found in step one of its penalty phase deliberations that the statutory aggravating factor of depravity of mind had been proven beyond a reasonable doubt. In step two, the jurors were unable to unanimously conclude that

the factors in mitigation outweighed those in aggravation. They went on to step three, therefore, which directed them to determine whether, under all the circumstances, death was warranted. The jurors were unable to agree on punishment. Under section 545.030, if the jurors are unable to agree unanimously at this step in their deliberations, then the question of punishment goes to the trial court. The trial court considered all of the evidence, including *262 the aggravating factor found by the jury, and sentenced Mr. McLaughlin to death. He appeals his conviction and death sentence.

II. STANDARD OF REVIEW

[1] [2] [3] The evidence is reviewed in the light most favorable to the verdict. *State v. Strong*, 142 S.W.3d 702, 710 (Mo. banc 2004). The trial court is vested with broad discretion in determining the admissibility of evidence offered at the guilt and penalty phases of a capital case. *State v. Storey*, 40 S.W.3d 898, 903 (Mo. banc 2001); *State v. Middleton*, 995 S.W.2d 443, 452 (Mo. banc 1999). This Court's direct appeal review is for prejudice, not mere error, and the trial court's decision will be reversed only if the error was sufficiently prejudicial that it deprived the defendant of a fair trial. *Id.* Any issue that was not preserved can only be reviewed for plain error, which requires a finding that manifest injustice or miscarriage of justice has resulted from the trial court error. *State v. Glass*, 136 S.W.3d 496, 507 (Mo. banc 2004).

In addition, in reviewing the jury's decision to impose a death sentence, section 565.035.3 requires this Court to undertake a proportionality review to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found; and (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

III. DISCUSSION

A. The Trial Court May Impose a Sentence of Death When the Jury Deadlocks on the Final Step of Section 565.030.4.

[4] Mr. McLaughlin argues that section 565.030.4 is unconstitutional to the extent that it requires the judge to make the findings of fact necessary to make a defendant eligible for a sentence of death if, as occurred here, the jury is unable to agree on punishment in the final step of the deliberative process. In support, he cites to *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), which held that "[c]apital defendants, no less than noncapital defendants, ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589, 122 S.Ct. 2428.

As Mr. McLaughlin notes, in *State v. Whitfield*, 107 S.W.3d 253, 258 (Mo. banc 2003), this Court applied the principles of *Ring* to section 565.030. *Whitfield* noted that in this section the legislature conditioned

an increase in punishment from life imprisonment to death on the jury following a four-step process (since reduced to three steps),[2] all but the last step of which required the jury to make specific factual findings. *Id.* As the statute required the jury to find all three of the facts submitted in steps one through three in order to impose a death sentence, the failure of the jury to find one of these three facts required entry of a life sentence. *Id.* at 260-64.

[*263] The final step did not require the jury to make a finding in order to make the defendant eligible for death, but rather told the jury that even if it found the first three steps against the defendant, it could decide under all of the circumstances not to assess and declare the punishment at death. Therefore, if the jury became deadlocked on that last step, *Ring* did not prohibit the judge, as trier, from deciding the final step as required by section 565.030.4. *Id.* at 264, 270. The Whitfield jury was deadlocked, and the trial judge, as required by section 565.030.4, went through all four steps and then imposed a sentence of death. Because this Court could not determine at what point the jury deadlocked, since no specific jury interrogatories were submitted, this Court reversed the death sentence the trial judge had imposed in that case and remanded for entry of a life sentence. *Id.* at 269-272.

As Mr. McLaughlin notes, since *Whitfield*, the legislature has removed the requirement that the trier

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[2] After Mr. Whitfield was tried, section 565.030.4 was revised to delete what had been the second finding the jury was required to make concerning the presence of additional non-statutory aggravators. Compare sec. 565.030.4, RSMo 1993, with sec. 565.030.4, RSMo Supp. 2001.

separately find that the aggravating circumstances warrant death and has added a requirement that the jury find that defendant is not mentally retarded if that issue is contested (an issue not contested or submitted here). The legislature has not, however, changed the portion of section 565.030.4 that provides that the judge shall follow the same procedure the jury follows if the jury is unable to reach a verdict on punishment. The current version of section 565.030.4 states in relevant part:

> If the trier at the first stage of a trial where the death penalty was not waived finds the defendant guilty of murder in the first degree, a second stage of the trial shall proceed at which the only issue shall be the punishment to be assessed and declared. Evidence in aggravation and mitigation of punishment, including but not limited to evidence supporting any of the aggravating or mitigating circumstances listed in subsection 2 or 3 of section 565.032, may be presented subject to the rules of evidence at criminal trials.
>
> ....
>
> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
>
> (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggra-

vating circumstances set out in subsection 2 of section 565.032; or

(3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or

(4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

> If the trier assesses and declares the punishment at death it shall, in its findings or verdict, set out in writing the aggravating circumstance or circumstances listed in subsection 2 of section 565.032 which it found beyond a reasonable doubt. If the trier is a jury it shall be instructed before the case is submitted that if it is unable to decide or agree upon the punishment the court shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor or death. *The court shall follow the same procedure as set out in this [*264] section whenever it is required to determine punishment for murder in the first degree.*

Sec. 565.030.4, RSMo 2007 (emphasis added). Mr. McLaughlin argues this procedure violates *Whitfield* and requires reversal and remand for entry of a life sentence in any case, including this one, in which the jury deadlocks.

Mr. McLaughlin is incorrect. As the above discussion notes, *Whitfield* does not state that a judge cannot enter a death sentence if the jury deadlocks; it says, rather, that under the principles set out in *Ring*, the jury must make the required factual findings that increase the punishment from a life sentence to death. *Whitfield*, 107 S.W.3d at 261-62.

Since *Whitfield*, Missouri's instructions in capital cases have been revised to require the jurors to answer special interrogatories indicating whether they found a statutory aggravating factor to be present, and if so, what factor, and whether they found that mitigating evidence did not outweigh aggravating evidence. See MAI-CR 3d 314.40, 314.58. The jury in this case followed its instructions and answered that it did find the statutory aggravator that the crime was committed with depravity of mind in that Mr. McLaughlin committed repeated and excessive acts of physical abuse. It also specifically found that it could not unanimously conclude that the evidence in mitigation outweighed the evidence in aggravation of punishment. Its answers thus show that it became deadlocked only after making the necessary factual findings. *Whitfield* did not hold that a judge could not consider the facts and make a determination whether to impose death once a jury had found the facts necessary to make a defendant eligible for a death sentence under section 565.030.4, and such a procedure does not violate *Ring*. The judge below did not err in reconsidering the facts and determining

that under all of the circumstances death should be imposed.

Mr. McLaughlin also argues that the trial judge actually went beyond the jury's findings that he acted with depravity by committing repeated and excessive acts of physical abuse, because the judge also said that these acts "encompassed beating, stabbing and sexual intercourse on a continuous basis." Mr. McLaughlin argues that the finding of "sexual intercourse on a continuous basis" is inconsistent with the jury's failure to find that the murder was committed while he was perpetrating the forcible rape, and its rejection of the charge of armed criminal action in regard to the rape.[3]

This Court again disagrees. While the jury did reject two aggravating factors, it did find Mr. McLaughlin forcibly raped the victim. The court's finding of sexual intercourse on a continuous basis, therefore, was not inconsistent with the jury's verdict.

B. Alleged Errors in Penalty-Phase Jury Instructions

1. Whether Evidence as a Whole Justifies a Sentence of Death or Life Imprisonment

[5] [6] Mr. McLaughlin requested an instruction not included in MAI-CR, which would have directed the

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[3] The reference to "on a continuous basis" concerns whether the rape was part of a continuous series of acts that constituted forcible compulsion even if the victim was deceased before the culmination of the rape, as discussed infra, rather than some separate finding as to the nature of the rape itself, and is not inconsistent with the jury's findings.

jury to determine "whether the evidence as a whole justifies" imprisonment for life or a sentence of death. The trial court did not err in refusing this offered instruction. While Mr. [*265] McLaughlin is correct that section 565.032.1(2) provides that the judge shall instruct the jury to consider whether a statutory aggravating circumstance has been proved beyond a reasonable doubt and, if so, "whether the evidence as a whole justifies a sentence of death or a sentence of life imprisonment, ..." it is well-settled that instructions to the jury need not use the exact language of statutes. *See* United States v. Claxton, 276 F.3d 420, 423 (8th Cir.2002) ("[a defendant] is not entitled to a particularly worded instruction"); State v. Newlon, 627 S.W.2d 606, 614 (Mo. banc 1982), *overruled on other grounds*, State v. Carson, 941 S.W.2d 518 (Mo. banc 1997) (while instruction in death penalty case "does not utilize the precise statutory words, it nevertheless employs terms which have been determined as proper substitutes by our courts"). Statutes are intended to set out the law; instructions are intended to provide the jury with directions as to how to determine the facts under that law.

In accordance with MAI-CR 3d 314.44, Instruction 24 specifically told the jury that if it found a statutory aggravator:

> you must then determine whether there are facts or circumstances in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.

> In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial ...

Instruction 25 further instructed the jury:

> You are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death.

Instruction 26 again instructed the jury it must consider "all of the evidence" in deciding punishment and that it is the primary duty of the jury to fix punishment.

These instructions adequately informed the jury that it is up to it to determine whether the evidence as a whole justifies life or death. Further, Mr. McLaughlin's suggestion that section 565.032.1(2) sets out an additional element that must be the subject of a separate, special finding in order to make defendant death-eligible is not supported by the statutory language. The statutes nowhere state such a finding is required in order to impose a death sentence; the legislature set out the required findings in section 565.030, not section 565.032.1.

2. Requirement of Unanimous Decision that Mitigating Evidence Outweighs Aggravating Evidence

Finally, although not set out in his Points Relied On, or objected to at trial, in the body of his argument

Mr. McLaughlin asserts that the trial court erred in instructing the jury that it was required to *unanimously* agree that the evidence in mitigation outweighed the evidence in aggravation in order to be required to return a life sentence at step two of the procedure set out in the current version of section 565.030.4. He notes section 565.030 does not mention how many jurors must agree on any proposition, but merely says "if the trier concludes that there is evidence in mitigation of punishment that is sufficient to outweigh the evidence in aggravation of punishment found by the trier," then it shall impose a life sentence.

A logical reading of the phrase "if the trier concludes," Mr. McLaughlin argues, is that it requires a majority of jurors to conclude that facts in mitigation outweigh those in aggravation; if a majority so [*266] finds, he contends, then "the trier"-that is, the jury-has so found. Therefore, he argues, Missouri's jury instructions are in error in requiring the jury to unanimously find that evidence in mitigation outweighs evidence in aggravation in order to be required to impose a life sentence in this step under the statute. The Court reviews this point for plain error. Rule 30.20.

Mr. McLaughlin cites no authority, and none is found, that the United States or Missouri constitutions bar instructing the jury that in order to return a sentence of life imprisonment at this particular step it must unanimously find that mitigating evidence outweighs aggravating evidence. To the contrary, while *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and *McKoy v. North Carolina*, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), hold that it is improper to re-

quire jurors to be unanimous in their conclusion that a particular mitigating factor is present, they did not disapprove of state statutes that require the jurors to all agree that whatever mitigating factors they do find outweigh the aggravating factors.

Missouri's instructions do clearly tell the jury, "[i]t is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment." MAI CR3d 314.44. They elsewhere properly permit jurors, in the final step of their penalty phase deliberations, to vote for life imprisonment rather than death even though they did not find unanimously that factors in mitigation outweighed those in aggravation. MAI-CR3d 314.46. There is no error of constitutional proportions in these instructions.

The question, thus, becomes one of statutory interpretation. Mr. McLaughlin concedes that *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005), rejected an identical argument concerning whether section 565.030.4 requires unanimous findings, and neither party has identified any other Missouri cases addressing this issue. This Court's independent review of a cross-section of cases in other jurisdictions that also have statutes requiring a jury to consider whether mitigating evidence outweighs aggravating evidence has not revealed any instance in which a statute has been interpreted to mean that a life sentence must be returned if there is a majority rather than unanimous vote that mitigating evidence exceeds that in aggravation, except where the statute explicitly so requires.[4] To the contrary, in the one

[4] A few statutes do specifically provide for a decision by majority rule. *See, e.g.*, *Waldrop v. State*, 859 So.2d 1138, 1172 (Ala.Crim.App.2001) (noting under Alabama statutes "unanim-

case to address an equivalent issue, *People v. Colon*, 272 Conn. 106, 864 A.2d 666 (2004), Connecticut jury instructions required unanimity under a statute that, similarly to Missouri's, simply says that "the jury" must find mitigating evidence outweighs that in aggravation.[5] In approving that portion of [*267] the instruction, the Connecticut Supreme Court stated, "it is no longer necessary for the jury unanimously to agree on whether a mitigating factor or factors exist, but the jurors must unanimously agree on whether the aggravating factor or factors outweigh the mitigating factor or factors." *Id.* at 813 (footnote omitted).

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ity is not required in the penalty phase. Ten votes are required in order to recommend death. At least seven votes are required in order to recommend life without parole"); Fla. Stat. Sec. 921.141.(3) (notes that the judge imposes final sentence after receiving an advisory sentence recommendation from "a majority of the jury").

[5] Connecticut General Statutes section 53a-46a(g) stated:

> If the jury ... finds that ... one or more of the aggravating factors ... exist and one or more of the mitigating factors exist, but the one or more aggravating factors ... do not outweigh the one or more mitigating factors, the court shall impose a sentence of life imprisonment without the possibility of release.

The jury instruction approved in *Colon*, 864 A.2d at 816, stated:

> If your deliberations result in [a] unanimous agreement that the aggravating factor does not outweigh any mitigating factor or factors, you would indicate that on the verdict sheet.... Upon that finding, the court will impose a sentence of life imprisonment without the possibility of parole.

In the absence of guiding case or other authority, the language of the statute itself provides the best guide. This Court has recently held:

> 'The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning.' *In re Boland*, 155 S.W.3d 65, 67 (Mo. banc 2005). In determining the intent and meaning of statutory language, 'the words must be considered in context and sections of the statutes in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words.' *State ex rel. Wright v. Carter*, 319 S.W.2d 596, 600 (Mo. banc 1959). 'The provisions of a legislative act are not read in isolation but construed together, and if reasonably possible, the provisions will be harmonized with each other.' *Bachtel v. Miller County Nursing Home Dist.*, 110 S.W.3d 799, 801 (Mo. banc 2003).

State ex rel. Evans v. Brown Builders Elec. Co., Inc., 254 S.W.3d 31, 35 (Mo. banc 2008). Applying these principles here, section 565.030.4 states in relevant part:

> (1) If the trier finds by a preponderance of the evidence that the defendant is mentally retarded; or
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> (2) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or

> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
>
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death. If the trier is a jury it shall be so instructed.

Sec. 565.430.4. Each of these subdivisions uses identical language requiring "the trier" to find, or not to find, that the defendant is mentally retarded, or that there is a statutory aggravating circumstance, or that the evidence in mitigation is sufficient to outweigh that in aggravation, or that under all the circumstances a punishment of death shall not be imposed. Thus, if the legislature intended a majority vote to fulfill the requirement that "the trier concludes" that mitigating evidence outweighs aggravating evidence, then it must also have intended a majority vote to be sufficient under the other three subdivisions of that section.

Clearly, however, that cannot be the case. Subdivision (2), for instance, requires the trier to find a statutory aggravating circumstance. *Ring* requires that all facts necessary to increase punishment must be found by the jury. If a majority vote that a statutory aggravator was present were sufficient, the statute would be in conflict with this requirement. *See also* *Whitfield*, 107 S.W.3d at 257-259.

[*268] Similarly, under subdivision (4), if a majority vote were sufficient to constitute "the trier" deciding under all the circumstances not to assess punishment at death, then only those instances in which less than a majority reached that decision would be a hung jury. Yet, the remainder of section 565.030.4 treats all instances in which the jury cannot unanimously agree on punishment in this final step in the same way: the jury is considered deadlocked and the question of punishment is left to the judge.

[7] For these reasons, this Court reaffirms its holding in *Zink* that under section 565.030.4(2), the jury must unanimously decide that the mitigating evidence outweighs the aggravating evidence in order to be required to return a life sentence. There was no plain error in submitting this instruction.

C. Whether Forcible Rape Must Be Completed While the Victim is Still Alive

Missouri's forcible rape statute, like that of most jurisdictions, does not expressly address whether the victim must be alive at the time of penetration. It simply states that a "person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion...." Sec. 566.030(1). Mr. McLaughlin argued to the trial court that one cannot act with forcible compulsion against a person who is already dead; therefore, in order to prove the "forcible compulsion" element of forcible rape, the state must show beyond a reasonable doubt that the victim was alive at the culmination of the rape.

Because Mr. McLaughlin claimed (contrary to the state's evidence based on the blood stains in the

parking lot) that he had raped the victim after he stabbed her to death, he argued that the court should have directed a verdict in his favor on the rape count, as his crime at most constituted necrophilia or desecration of a corpse. Alternatively, he argued that the court should have instructed the jury that if it had reasonable doubt that the victim was alive when Mr. McLaughlin had sexual intercourse with her, it must find him not guilty of forcible rape.

The trial court rejected Mr. McLaughlin's arguments, stating, "I don't know that she actually has to be alive at the actual time-time of the sexual penetration. When it says forcible compulsion, that is all part of rape. So if a man, in the process of raping a woman, is killing her, that's the forcible compulsion." It then ruled that even if the actual assault occurred later, after Ms. Guenther was dead, it began with the stabbing so "it's still a part of the continuous series of events that's part of the rape." On appeal, Mr. McLaughlin claims this was reversible error. This Court disagrees.

As have the majority of jurisdictions to address this issue,[6] this Court adopts the "ongoing criminal assault" rule. Under that rule, where the forcible compulsion that leads to the rape begins before the

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[6] *See e.g.*, *Smith v. Com.*, 722 S.W.2d 892 (Ky.1987); *Lipham v. State*, 257 Ga. 808, 364 S.E.2d 840 (1988); *State v. Brobeck*, 751 S.W.2d 828 (Tenn.1988); *State v. Honie*, 57 P.3d 977 (Utah, 2002); *Lewis v. State*, 889 So.2d 623 (Ala.Crim.App.2003); *State v. LaTourelle*, 343 N.W.2d 277 (Minn.1984); *State v. Jones*, 308 N.J.Super. 174, 705 A.2d 805 (1998); *Com. v. Waters*, 420 Mass. 276, 649 N.E.2d 724 (1995); *State v. Collins*, 66 Ohio App.3d 438, 585 N.E.2d 532, 536 (1990); and *State v. Gallegos*, 178 Ariz. 1, 870 P.2d 1097, 1105 (1994).

death of the victim, the defendant is guilty of rape even if the jury believes defendant killed the victim before penetration or before the sexual assault was concluded. As the Tennessee Supreme Court noted in [*269] adopting the majority rule, there are important policy reasons why the death of the victim during the assault should not preclude a conviction of rape:

> We are likewise unable to embrace the notion that the fortuitous circumstance, for the rapist, that death may have preceded penetration by an instant, negates commission of the crime of aggravated rape and reduces it to a relatively minor offense associated with erotic attraction to dead bodies. Reading the "live only" requirement into the statute encourages rapists to kill their victims, in our opinion.

State v. Brobeck, 751 S.W.2d 828, 832 (Tenn.1988) (emphasis added).

The Georgia Supreme Court similarly reasoned that the perpetrator should not be effectively rewarded for using force sufficient to cause death, stating:

> If the element of force is satisfied where the defendant has used less than deadly force to overcome the victim's resistance so as to allow him to have carnal knowledge of the victim, the element of force is surely no less satisfied when the defendant has used deadly force to accomplish his aim.

Lipham v. State, 257 Ga. 808, 364 S.E.2d 840, 842 (1988).

Lipham analogized to when an armed robber first kills his victim and then takes his money. Even though the victim is dead when the robbery is consummated, and thereafter can no longer be "forced" to do anything, it is still armed robbery because the theft continues and is able to be accomplished due to the deadly earlier force. *Id.* (citation omitted). So, too, in a forcible rape prosecution, where defendant has rendered the victim "permanently unconscious" as a part of a course of continuous conduct that resulted in the rape, the state has met its burden of proving forcible compulsion. *Id.*

The Utah Supreme Court similarly recognized that the single, continuous assault rule provides the appropriate standard where the defendant killed the victim after beginning the forcible compulsion that led to the rape. As the concurring opinion stated:

> I find it difficult to believe that the legislature, in enacting the corpse desecration statute, intended it to apply, to the exclusion of other statutes relating to sexual assault, in cases where a defendant's single, continuous assault on a victim results in the victim's death and in sexual contact.

State v. Honie, 57 P.3d 977, 997 (Utah 2002) (Durrant, J., concurring).[7]

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[7] *Compare* *State v. LaTourelle*, 343 N.W.2d 277 (Minn.1984) (defendant convicted of first degree felony-murder where he intended to rape victim prior to the homicide, but the rape took place after the homicide) with *State v. Givens*, 332 N.W.2d 187 (Minn.1983) (defendant acquitted of first-degree felony-murder where he participated in murder of victim, then returned to murder scene a short time later to rape victim).

[8] This Court agrees and adopts the majority rule that considers the entirety of a defendant's conduct from the beginning of the assault through completion of the sexual contact. It is rape where defendant both kills and sexually assaults a victim in a single, continuous act, or in a series of closely related acts, and where, as a part of the course of conduct, defendant uses forcible compulsion against the victim, even if portions of the rape, including penetration, occur once the victim already has been killed.

In so holding, this Court expressly rejects Mr. McLaughlin's request that Missouri adopt the minority "bright-line" rule that a rape victim must be alive at the [*270] moment of penetration.[8] These courts reason that rape must be accomplished against a person's will, and once one is dead one has no will which can be overborne. *See, e.g.*, *People v. Sellers*, 203 Cal.App.3d 1042, 1050, 250 Cal.Rptr. 345 (Cal.App. 4 Dist.1988). While true, where the perpetrator uses force to gain control over the victim, defendant has used force to accomplish the rape just as much as if the force occurred later in the sexual contact. Perhaps that is why two of the decisions that

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[8] *See e.g.*, *Doyle v. State*, 112 Nev. 879, 921 P.2d 901 (1996), *overruled on other grounds by* *Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004); *People v. Davis*, 10 Cal.4th 463, 41 Cal.Rptr.2d 826, 896 P.2d 119, 151 n. 20 (1995); *State v. Perkins*, 248 Kan. 760, 811 P.2d 1142 (1991); *Com. v. Sudler*, 496 Pa. 295, 436 A.2d 1376 (1981); *Rogers v. State*, 890 P.2d 959 (Okl.Cr.1995) (assuming rather than deciding that rape requires live victim); and *State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679 (Wis.Ct.App.1985). Additionally, *People v. Hutner*, 209 Mich.App. 280, 530 N.W.2d 174 (1995), followed the minority rule, but a different panel of the Michigan Court of Appeals rejected *Hutner* and opted instead to follow the majority ongoing criminal assault rule. *People v. Diefenbach*, 1996 WL 33360429 (Mich.Ct.App.1996) (unpublished).

adopted the minority rule were later effectively overruled when those states' legislatures adopted the continuous conduct rule by statute.[9]

D. Refusal to Submit Felony Murder

[9] Mr. McLaughlin next argues that the trial court erred in submitting only first-degree and conventional second-degree murder and in refusing to also submit second-degree felony murder. He notes that the state argued that he raped the victim in the same incident in which he murdered her and submitted counts of both forcible rape and first-degree murder. The jury in fact found that Mr. McLaughlin forcibly raped the victim and that he murdered her. Therefore, Mr. McLaughlin argues, the trial court should have submitted felony murder so that he could have argued that if the jury found that he killed the victim in furtherance of the rape, it should convict him of second-degree felony murder rather than first-degree murder.

[10] Mr. McLaughlin is correct that a trial court is obligated to charge the jury with respect to lesser included offenses that are supported by the evidence, so as to give it a third choice beyond either acquittal or first-degree murder. *Beck v. Alabama*, 447 U.S. 625, 637-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); *State v. Hall*, 982 S.W.2d 675, 682 (Mo. banc 1998); Sec. 556.046, RSMo 2000. Felony murder is a lesser-included offense of first-degree murder. Sec. 565.025.2(1)(a). Conventional second-degree murder is also a lesser-included offense of first-degree murder, however. For this reason, as Mr. McLaughlin recognizes, *Hall* held that it was not error to refuse

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[9] *See* Wis. Stat. sec. 940.225(7) and 18 Pa.C.S. sec. 3123(e).

to submit felony murder so long as the trial court did submit second-degree murder, for when "a jury convicts on first-degree murder after having been instructed on second-degree murder, there is no prejudice to the defendant by the refusal to submit a second-degree felony murder instruction." *Hall*, 982 S.W.2d at 682, (*quoting State v. Kinder*, 942 S.W.2d 313, 330 (Mo. banc 1996)).

Mr. McLaughlin acknowledges *Hall*, but argues that it is distinguishable because in that case the prosecution did not also submit the felony that underlies the felony murder charge, whereas here the prosecutor did submit both murder and forcible rape. He also argues that he should have had the option, at least, of choosing which form of second-degree murder to submit in this situation.

[*271] While the prosecution in *Hall* did not submit the underlying felony, the case on which it relied, *Kinder*, did submit both first and conventional second-degree murder and rape, just as in the case at bar. Thus, it is directly on point. *Kinder* held that because the pattern criminal jury instructions require the jury to find defendant not guilty of first-degree and conventional second-degree murder before considering the felony murder instruction, no prejudice could result from failing to submit felony murder. *Kinder*, 942 S.W.2d at 330.

Of course, Mr. McLaughlin is correct that the trial court could have submitted felony-murder rather than or in addition to submitting conventional second-degree murder without committing error if both were supported by the evidence. But, the issue is not what the trial court could have done, but whether prejudice resulted from its failure to submit felony

murder. *Hall*, *Kinder*, and numerous other cases hold that no prejudice results from refusing to submit a felony murder instruction where a conventional second-degree murder instruction was given because the latter sufficiently tests the evidence of deliberation by giving the jury the option of convicting the defendant of a lesser offense. *See* *Schad v. Arizona*, 501 U.S. 624, 647-48, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991); *State v. Wise*, 879 S.W.2d 494, 517 (Mo. banc 1994), *overruled on other grounds by Joy v. Morrison*, 254 S.W.3d 885 (Mo. banc 2008). This Court reaffirms these holdings.

E. Forfeiture by Wrongdoing Doctrine

[11] In the guilt phase, the trial court admitted evidence that police officers escorted the victim from her office to her car and, at her request, they followed her several miles from work until she reached the highway. In the penalty phase, the trial court admitted evidence concerning Mr. McLaughlin's harassing and threatening conduct toward the victim, including evidence of a prior incident in which he jumped out of the bushes at her as she left work, assaulted her by grabbing her left breast, and repeatedly showed up at her work, despite various protective orders that were in place. Evidence was also presented that he was charged with burglary for entering her home and taking a variety of items, some of which may have been his but some of which belonged to the victim.

Mr. McLaughlin argues that this evidence constituted improper testimonial evidence that was prohibited under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because the victim was not present at trial to be cross-examined

about these statements. Mr. McLaughlin concedes the incongruity of arguing that she had to be present to be cross-examined when the reason she was not present was that he had murdered her, particularly where, as here, he confessed to the murder and contested only his state of mind at the time of the killing. But, he argues, even in such circumstances, her unconfronted statements are excluded by the Sixth Amendment's confrontation clause.

The state urges this Court to recognize the "forfeiture by wrongdoing" exception to the confrontation clause. This equitable principle holds that "if a witness is absent by [defendant's] own wrongful procurement, [defendant] cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts." *Reynolds v. United States*, 98 U.S. 145, 158, 25 L.Ed. 244 (1878).

[*272] Mr. McLaughlin argues that this exception cannot apply where the purpose of keeping the witness away was not related to the present case. In other words, the exception would apply at a trial for the burglary of the victim's home and at an adult abuse trial if he killed her to keep her from testifying at that burglary trial and adult abuse trial, but here he is being tried for murder, and since he did not kill her in order to keep her from testifying at his trial for her own murder, the exception would not apply.

The parameters of the forfeiture by wrongdoing doctrine have been clarified by the United States Supreme Court since this case was submitted. *Giles v. California*, 554 U.S. ----, 128 S.Ct. 2678, 171 L.Ed.2d 488 (June 25, 2008). Under *Giles*, those parameters

are not as circumscribed as defense counsel argues, at least in the context of cases involving domestic violence. In *Giles*, the trial court allowed into evidence statements made by a murder victim to a police officer responding to a domestic violence call. *Crawford* was decided while the case was on appeal in the California courts. Those courts held that the forfeiture by wrongdoing doctrine provided an exception to *Crawford* that applied even if defendant did not engage in the wrongdoing (in that case, murder) to prevent the victim from testifying. The United States Supreme Court agreed that the forfeiture by wrongdoing doctrine constitutes an exception to the Confrontation Clause, but also held that for it to apply, the state must show that the defendant engaged in the wrongdoing with the intent to prevent the witness from testifying. *Giles*, 128 S.Ct. at 2683-2687.

This holding does not aid Mr. McLaughlin, however, for *Giles* went on to specifically discuss the application of the doctrine to cases of domestic violence in which the defendant has allegedly murdered the victim. In so doing, it indicated that past acts of violence resulting in murder may be admissible because:

> Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. *Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecu-*

> *tion-rendering her prior statements admissible under the forfeiture doct: ine. Ea .ier abuse, or threats of abuse, intended to dissuade the victim from resorting to outside help would be highly relevant to this inquiry, as would evidence of ongoing criminal proceedings at which the victim would have been expected to testify.*

Id. at 2693 (emphasis added). These principles are directly applicable to the present case. The trial court below specifically stated:

> The Court further finds-and the Court takes all the findings and finds by clear and convincing evidence that the defendant intended to make Ms. Guenther unavailable as a witness, both in the burglary and in the abuse cases, to be a witness against him. He was charged and also did the murder to procure her unavailability as a witness.

In these circumstances, the trial court having found that Mr. McLaughlin's intent was to procure the victim's unavailability as a witness, evidence of her statements about Mr. McLaughlin's attacks on her and comments to her comes squarely within the type of evidence *Giles* states is admissible under the forfeiture by wrongdoing[*273] doctrine.[10]

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[10] The trial court's finding that Mr. McLaughlin intended to make Ms. Guenther unavailable as a witness, both in the burglary and in the abuse cases, and murdered her to procure her unavailability as a witness, is supported by ample evidence. Ms. Guenther's statements prior to her death about defendant's stalking of her, threats to her, and abusive conduct were made during the time that she was attempting to break from the relationship and had filed for orders of protection and sought pro-

F. Penalty Phase Errors in Admitting Evidence

1. Victim Impact Evidence

[12] Mr. McLaughlin recognizes that "victim impact" evidence is admissible in the penalty phase of the trial under *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), but asserts that the court went beyond permissible bounds when it admitted the testimony of the victim's 29-year-old son regarding the death of his little brother (the victim's young son) and his grandfather when he was a child, and his belief that the deaths contributed to the breakup of the marriage of the victim and her husband. Mr. McLaughlin asserts that improper admission of this testimony prejudiced him by encouraging the jury to consider irrelevant, but tragic, life events of the witness and his family and to make its decision based on passion, prejudice, and emotions.

[13] [14] [15] Victim impact evidence is admissible under the United States and Missouri Constitutions. *State v. Forrest*, 183 S.W.3d 218, 225 (Mo. banc 2006); *State v. Roberts*, 948 S.W.2d 577, 604 (Mo. banc 1997). "[J]ust as the defendant is entitled to present evidence in mitigation designed to show that the defendant is a uniquely individual human being, the State is also allowed to present evidence showing each victim's uniqueness as an individual human be-

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tection from the police so that she could safely go from work to home. The police were prosecuting him for burglary of her home less than a month prior to the murder, and during the succeeding month he was seen watching her home. The latest order of protection had been entered the very day of her death, November 20, 2003, and a hearing on the order of protection had been set for the very next day.

ing." *Payne*, 501 U.S. at 825, 111 S.Ct. 2597. See also, *State v. Deck*, 994 S.W.2d 527, 538 (Mo. banc 1999). "Victim impact evidence violates the constitution only if it 'is so unduly prejudicial that it renders the trial fundamentally unfair.' " *State v. Gill*, 167 S.W.3d 184, 195 (Mo. banc 2005).

In *Forrest*, defendant complained about victim impact testimony concerning the death of the victim's brother and the deteriorating health of another of her brothers. In rejecting Forrest's argument, the Court noted that, "[i]t is not necessary that every piece of victim impact evidence relate to the direct impact of the victim's death on the witness." *Forrest*, 183 S.W.3d at 225, *quoting Gill*, 167 S.W.3d at 196. Here, while it would have been preferable not to admit the evidence, the issue is whether its admission was "so unduly prejudicial that it rendered the trial fundamentally unfair," *Gill*, 167 S.W.3d at 195. The only evidence of such undue prejudice that Mr. McLaughlin cites is the fact that the jury was unable to agree on a verdict. But, there is nothing to connect the jury's deadlock to the admission of this peripheral testimony. This point is denied.

2. Excluding Evidence of the Involvement of Another in Disposing of the Body

[16] Mr. McLaughlin asserts that the trial court improperly rejected his offer of proof that his brother was involved in the disposal of the victim's body. Mr. McLaughlin admits that he failed to include this issue in his motion for new trial, and thus that this Court's review is only [*274] for plain error. Rule 29.12; *State v. Glass*, 136 S.W.3d 496, 507 (Mo. banc 2004).

According to Mr. McLaughlin's offer of proof at trial, his brother told another relative that "he had tied [the victim's] legs together and helped drag the body to the riverbank." Mr. McLaughlin admits that this statement was hearsay because he sought to admit it for its truth-that is, to prove his brother really had tied the victim's legs together and dragged the body to the riverbank. *See* State v. Barnett, 980 S.W.2d 297, 306 (Mo. banc 1998). But, he argues it was nonetheless admissible because under the facts of this case its exclusion constituted a violation of the due process clause, citing *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), and *State v. Phillips*, 940 S.W.2d 512 (Mo. banc 1997).

Both cases are distinguishable. In *Phillips*, the refused evidence would have shown that defendant's son was the one that cut up the victim's body and permitted the inference that Phillips had not herself engaged in this depraved conduct. *Phillips*, 940 S.W.2d at 517. Green involved a crime for which Green and another man, Moore, were indicted together for rape and murder. At Moore's trial, a witness for the state, Thomas Pasby, testified that Moore had confided that he had killed the victim by shooting her twice while he sent Green to run an errand. *Green*, 442 U.S. at 96, 99 S.Ct. 2150. This not only implicated Moore, but diminished Green's responsibility in significant respects. Moore was convicted of both crimes and was sentenced to death. When the state later tried Green, it successfully excluded, as hearsay, Pasby's testimony implicating Moore rather than Green. The United States Supreme Court reversed, holding that regardless of whether prohibited by Georgia's hearsay rule, the evidence was "highly relevant to a critical issue in the punishment phase of the trial, [citations omitted]

and substantial reasons existed to assume its reliability." *Id.* at 97, 99 S.Ct. 2150.

Here, unlike in either *Green* or *Phillips*, the refused testimony did not exculpate Mr. McLaughlin by showing that Mr. McLaughlin's brother committed the murder. Mr. McLaughlin does not claim that his brother took any part in the murder other than, after the fact, helping him tie the victim's ankles together and dispose of the body, acts to which the state did not give special attention in asking for the death penalty.[11] By contrast, in *Phillips* the prosecutor had focused the jury on the fact that Phillips had dismembered the victim. Cutting up a human corpse constitutes depravity far greater than tying the victim's ankles and helping dispose of the body. The trial court did not plainly err in excluding this evidence.

G. Penalty Phase Closing that Jurors Must be Soldiers

[17] Mr. McLaughlin argues that a new trial should be granted because, he contends, in closing argu-

[11] Further, unlike in *Green*, in which, the Supreme Court relied on the fact that the excluded evidence was reliable, 442 U.S. at 97, 99 S.Ct. 2150, in the present case there were not substantial reasons to assume the reliability of Mr. McLaughlin's brother's refused testimony. Portions of his account did not match evidence in the case, such as that Mr. McLaughlin stabbed the victim in the back and cut the victim's neck "from ear to ear and her neck to her pelvic bone." The evidence showed that the only injuries the victim had on her torso were three relatively small stab wounds. Additionally, there were no stab wounds to the victim's back. Finally, Mr. McLaughlin's blue jeans were covered in mud the morning after having disposed of the body at the muddy riverbank. However, his brother was clean the morning after the murder.

ment the prosecutor [*275] compared jurors to soldiers and implied the jurors had a duty to impose death, just as soldiers have duties in war they do not enjoy. He admits that no objection was made to this argument, but argues that this Court should find that the trial court plainly erred in failing to *sua sponte* interrupt the argument and take some appropriate action to minimize the prejudice it caused. In support, Mr. McLaughlin cites *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir.1985), *vacated on other grounds*, 478 U.S. 1016, 106 S.Ct. 3325, 92 L.Ed.2d 732 (1986), *reinstated*, 809 F.2d 700 (11th Cir.1987), and *Weaver v. Bowersox*, 438 F.3d 832 (8th Cir.2006). Neither requires reversal for the argument made here.

The "soldier" argument in *Weaver* is extensive, direct, graphic, and specifically tells the jury that it is its duty to impose the death penalty.[12] *Weaver* stated

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[12] The prosecutor in Weaver argued, in part:

> I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they were going to go out in battle and they were scared as young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in the pile of goo that a moment before was your best friend's face, you'll know what to do.
>
> ....

in disapproving such an analogy, "[w]hen a prosecutor tells a jury that they have a duty to kill and, as in this case, uses a graphic story from a movie to support that duty, the statement should be taken as 'calculated to remove reason and responsibility from the sentencing process.' " 438 F.3d at 840, *quoting*, *Newlon v. Armontrout*, 885 F.2d 1328, 1338 (8th Cir.1989). The Court concluded that this caused prejudicial error because:

> Soldiers have no choice but to kill. Soldiers follow orders when they kill. The responsibility for a particular death lies, therefore, with a commanding officer or the declaration of war itself, and not with a soldier's individual conscience. Furthermore, wartime killing is not a deliberative process, not a considered choice.
>
> Describing jurors as soldiers with a duty eviscerates the concept of discretion afforded to a jury as required by the Eighth Amendment.

Id. (citation omitted).

The comments in *Brooks* also extensively compared soldiers and jurors, and were similarly criticized by the Eleventh Circuit, saying, "[t]he principal fault of the analogy is that a capital sentencing jury ... is bound to exercise broad discretion in its determina-

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> Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do.
>
> ....
>
> [T]hen you've got to go to the jury room and you've just got to toughen up and do what's right, even though it's going to be tough.

tion of a just punishment. This discretion is simply not analogous to the role of a soldier who is ordered to kill the enemy." 762 F.2d at 1412. Like the Weaver prosecutor, the *Brooks* prosecutor told the jury it was its duty to impose the death penalty, including saying, "is it asking too much to ask you to go back and vote for the death penalty in this case...." But, *Brooks* ultimately found that the comments did not require a new trial[13] concluding that "there is no reasonable [*276] probability that the prosecutorial misconduct changed the outcome." *Id.* at 1416. The Court based its decision on the fact that after the prosecutor made the "soldier" argument, the defense counsel effectively responded to the argument and mitigated the effect of the analogy. Further, the jury instructions properly told the jurors their duty. Thus, Brooks found, when considered in the context of the entire trial, "it is not our duty to ask whether a particular remark was unfair; we are concerned with whether it rendered the entire trial

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[13] The prosecutor's closing in Brooks included the following, among other arguments:

> [D]uring my lifetime this country has been in three wars, each war we've taken our young men down to the age of seventeen, we've trained them, we've put guns in their hands, we've taught them how to kill the enemy, and we've sent them overseas, and they have killed other human beings who are enemies of our country, and when they did a good job of killing them, we decorated them and gave them citations, praised them for it.
>
> ....
>
> And, if we can send a seventeen-year old young man overseas to kill an enemy soldier, is it asking too much to ask you to go back and vote for the death penalty in this case ...

unfair. In this regard, isolated or ambiguous or unintentional remarks must be viewed with lenity." *Id.* at 1400, citing, *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

In the present case, the comment by the prosecutor was not as extensive as that criticized in *Weaver* or *Brooks*, and, unlike the prosecutors in both of those cases, the McLaughlin prosecutor did not tell the jury that it was its duty to impose death. Rather, he basically told the jurors that like soldiers, they had a duty, but he then identified that duty as being to hear the evidence and decide on a punishment, stating, "[s]o, ladies and gentlemen, you've heard all the evidence. You've heard both the aggravating and mitigating. It's up to you to decide." He did not tell them it was their duty to decide to kill, in other words, but to reach a decision.

Further, the court's instructions below, like those in *Brooks*, focused the jury's attention on the individualized facts and circumstances of the case and also repeatedly reminded the jury that it was the jury's job to decide the punishment of Mr. McLaughlin. While defense counsel had no opportunity to respond to the analogy, as it was made in rebuttal, as noted, neither did he object to it and so did not preserve it for appeal. This Court thus reviews only for plain error, *see* Rule 29.12, and finds no plain error resulting in manifest injustice from the trial court's failure to *sua sponte* interrupt and strike or otherwise take corrective action concerning the "soldier" comments made by the prosecutor in closing argument.

H. Failure of Information to Charge Specific Statutory Aggravators

Mr. McLaughlin asserts that the fact that the information did not itself list the statutory aggravators on which the jury would be instructed violates *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, and *Almendarez-Torres v. United States*, 523 U.S. 224, 228, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which he says require that the indictment set forth each element of the crime. This Court has repeatedly rejected identical arguments. Nothing in the cited cases requires aggravating circumstances to be listed in the indictment or information, as opposed to in a separate filing. Mr. McLaughlin received timely notice of the statutory aggravators that were alleged to be present. There is no merit to this argument. *See State v. Strong*, 142 S.W.3d 702 (Mo. banc 2004); *State v. Glass*, 136 S.W.3d 496, 520 (Mo. banc 2004).

I. Independent Proportionality Review

[*277] [18] [19] Finally, although Mr. McLaughlin does not argue on appeal that his sentence is disproportionate to his crime, this Court has an independent obligation to conduct a proportionality review, which is intended to ensure against the "wanton" and "freakish" imposition of the death penalty. *State v. Edwards*, 116 S.W.3d 511, 548 (Mo. banc 2003); *see Kansas v. Marsh*, 548 U.S. 163, 204, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (Souter, J., dissenting). The Missouri statutes require proportionality review in all death penalty cases, directing this Court to determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance ...;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence, and the defendant.

Sec. 565.035.3.

This Court has independently reviewed the record and does not find that the sentence of death was imposed under the influence of passion, prejudice or some other arbitrary factor, nor has Mr. McLaughlin identified any such factor to the Court. The Court further finds that the evidence supports the jury's and judge's determinations that the murder was committed with depravity of mind because the crime involved repeated and excessive acts of physical violence and the crime was therefore unreasonably brutal, as found by the jury and by the judge.

The evidence showed that the victim had defensive wounds on her face and arms indicating that she had struggled with her killer; that she had a bruised nose and scratches on her face, neck and wrists that were inflicted while she was still alive; and that she had a hemorrhage under the white of her eye and other indications that she had been strangled before

death. She was stabbed a total of seven times.[14] There was also evidence that Mr. McLaughlin raped the victim, at least beginning the rape while she was alive; further, if, as he argues, the rape occurred wholly or partially after death, the crime would be even more depraved.

To determine whether a sentence of death is excessive or disproportionate in comparison to similar cases, this Court notes that in *State v. Rodden*, 728 S.W.2d 212, 222 (Mo. banc 1987), this Court found the death penalty warranted by evidence that the victim had been stabbed 11 times, had defensive wounds, and was conscious during parts of the attack and tried to fend off the blows, and then her body was mutilated by fire after death. Similarly, in *State v. Kinder*, this Court noted numerous cases in which a jury imposed the death penalty where a defendant sexually abused or raped the victim during the perpetration of the offense and affirmed a [*278] death sentence where defendant raped and murdered the victim. *Kinder*, 942 S.W.2d at 339-40. *See also*, *State v. Lingar*, 726 S.W.2d 728 (Mo. banc), *ab-*

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[14] Defendant argues as a separate point that the definition of "excessive" was too vague to give the jury adequate guidance as to whether this evidence of multiple stab wounds, rape, bruising and other injuries constituted "repeated" or "excessive" brutality. For the reasons noted above, the Court rejects this argument. The depravity of mind language, when combined with an instruction more specifically defining the conduct-here requiring the jury to find that the conduct constituted "repeated and excessive acts of physical abuse"-is not unduly vague. *See, e.g.*, *State v. Johnson*, 207 S.W.3d 24, 46 (Mo. banc 2006), *cert. denied*, --- U.S. ----, 127 S.Ct. 2880, 167 L.Ed.2d 1156 (2007); *State v. Williams*, 97 S.W.3d 462, 473-74 (Mo. banc 2003). Stalking a woman, and later raping her and stabbing her seven times as she fights for her life constitutes repeated and excessive brutality under any definition of the term.

rogated by State v. Taylor, 238 S.W.3d 145 (Mo. banc 2007); *State v. Mercer*, 618 S.W.2d 1 (Mo. banc 1981).

For all of these reasons, this Court concludes that the sentence was not disproportionate to the strength of the evidence, the crime or the defendant.

IV. CONCLUSION

For the reasons set out above, the judgment is affirmed.

PRICE, TEITELMAN, RUSSELL, WOLFF and BRECKENRIDGE, JJ., concur.

Mo.,2008.
State v. McLaughlin
265 S.W.3d 257

APPENDIX B

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(573) 751-4144

September 30, 2008

Ms. Deborah B. Wafer
Office of State Public Defender
Suite 300
1000 St. Louis Union Station
St. Louis, MO 63103

In Re: State of Missouri, Respondent, vs. Scott A. McLaughlin, Appellant.
Missouri Supreme Court No. SC88181

Dear Ms. Wafer:

Please be advised that the Court issued the following order on this date in the above-entitled cause:

"Appellant's motion for rehearing overruled."

Very truly yours,

THOMAS F. SIMON

/s/ Cynthia L. Turley
Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:
Mr. Roger W. Johnson/Office of Missouri Attorney General

Mr. Shaun J. Mackelprang/Office of Missouri Attorney General

APPENDIX C

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF
THE COUNTY OF ST. LOUIS

STATE OF MISSOURI

STATE OF MISSOURI,	)
	)
Plaintiff,	)
	) Cause No. 03CR-5745
vs.	)
	) Division No. 12
SCOTT A. MCLAUGHLIN,	)
	)
Defendant.	)

VERDICT

(Jurors: Use this form only if you are unable to decide or agree upon the punishment. See Instruction No. 26 for directions as to what must be written on this verdict form. You will bear in mind, however, that under the law it is your primary duty and responsibility to fix the punishment.)

As to Count I, we the jury, having found the defendant Scott A. McLaughlin guilty of murder in the first degree of Beverly Guenther, are unable to decide or agree upon the punishment. We answer the following questions:

1. Does the jury unanimously find beyond a reasonable doubt statutory aggravating circumstance or circumstances?

Yes[✓] No[ ]

(Jurors: If the answer to Question (1) is no, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

2. Does the jury unanimously find that there are facts and circumstances in mitigation of punishment sufficient to outweigh facts and circumstances in aggravation of punishment?

Yes[ ] No[✓]

(Jurors: If the answer to Question 2 is yes, the jury must return the verdict form fixing the defendant's punishment at life imprisonment without eligibility for probation or parole.)

If the answer to Question 1 is yes, list below the statutory aggravating circumstance or circumstances that you have unanimously found beyond a reasonable doubt:

1. Whether the murder of Beverly Guenther involved depravity of mind and whether, as a result thereof, the murder was outrageously and wantonly vile, horrible, and inhuman. You can make a determination of depravity of mind only if you find:

That the defendant committed repeated and excessive acts of physical abuse upon Beverly

Guenther and the killing was therefore unreasonably brutal.

INSTRUCTION NO. 24

As to Count I, if you have unanimously found beyond a reasonable doubt that one or more of the statutory aggravating circumstances submitted in Instruction No. 23 exists, you must then determine whether there are facts or circumstances, in mitigation of punishment which are sufficient to outweigh facts and circumstances in aggravation of punishment.

In deciding this question, you may consider all of the evidence presented in both the guilt and the punishment stages of trial, including evidence presented in support of the statutory aggravating circumstances submitted in Instruction No. 23 and evidence presented in support of mitigating circumstances submitted in this instruction.

You shall also consider any facts or circumstances which you find from the evidence in mitigation of punishment.

It is not necessary that all jurors agree upon particular facts and circumstances in mitigation of punishment. If each juror determines that there are facts or circumstances in mitigation of punishment sufficient to outweigh the evidence in aggravation of punishment, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

INSTRUCTION NO. 25

As to Count I, you are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

INSTRUCTION NO. 26

You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.

As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Beverly Guenther, your foreperson must complete the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 23 which you found beyond a reasonable doubt. The foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, then the defendant must be punished for the murder of Beverly Guenther by imprisonment for life by the Department of Corrections without

eligibility for probation or parole, and your foreperson will sign the verdict form so fixing the punishment.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Beverly Guenther by imprisonment for life by the Department of Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.

If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 23, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 23, and you are unable to unanimously find that the facts or circumstances in mitigation of punishment outweigh the facts and circumstances in aggravation of punishment, but are unable to agree upon the punishment, your foreperson will complete the verdict form and sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, you must answer the questions on the verdict form and write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 23 that you found beyond a reasonable doubt and your foreperson must sign the verdict form stating that you are unable to decide or agree upon the punishment.

If you return a verdict indicating that you are unable to decide or agree upon the punishment, the Court will fix the defendants punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.